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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IN RE HUBERT L. WILL,
Senior Judge of the United States District
Court for the Northern District
of Illinois, Eastern Division

PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE HONORABLE HARLINGTON WOOD, JR., RICHARD D. CUDAHY AND MICHAEL S. KANNE, JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OR, IN THE ALTERNATIVE, PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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December 8, 1989

QUESTIONS PRESENTED

1. Whether a United States court of appeals has jurisdiction to vacate *sua sponte* a settlement reached by the parties and approved by the district court when there is no case or controversy before it and no party objects to the settlement.

2. Whether a United States court of appeals may vacate *sua sponte* a district judge's approval of a class action settlement in the absence of any objection to the settlement from any party.

PARTIES TO THE PROCEEDING

Petitioner, the Honorable Hubert L. Will, is one of two United States district judges who presided over the multidistrict class action proceedings known as *In re Folding Carton Antitrust Litigation* (No. MDL-250) (N.D. Ill.).[1] The named respondents, the Honorable Harlington Wood, Jr., Richard D. Cudahy and Michael S. Kanne, are three United States circuit judges for the Court of Appeals for the Seventh Circuit.

The plaintiff class in *Folding Carton* included 2700 plaintiffs and consisted of all persons in the United States (excluding defendants, their subsidiaries, affiliates or agents), who purchased folding cartons from any of the defendants in the proceedings during the period from January 1, 1960 to December 31, 1974.

The defendants were Alton Box Board Company, American Can Company, Brown Company, Burd & Fletcher Company, F.N. Burt Company, Inc., Champion International Corporation, Consolidated Packaging Corporation, Diamond International Corporation, Eastex Packaging, Inc., Federal Paper Board Company, Inc., Fibreboard Corporation, The A.L. Garber Company, Inc., Georgia-Pacific Corporation, Gulf States Paper Corporation, Hoerner Waldorf Corporation, International Paper Company, Interstate Folding Box Company, The Mead Corporation, Olinkraft, Inc., Packaging Corporation of America, Potlatch Corporation, Rexham Corporation, St. Regis Paper Company, Weyerhaeuser Company, and Container Corporation.

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[1] The Honorable Edwin A. Robson, who also presided over the litigation, is deceased.

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PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE HONORABLE HARLINGTON WOOD, JR., RICHARD D. CUDAHY AND MICHAEL S. KANNE, JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OR, IN THE ALTERNATIVE, PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, the Honorable Hubert L. Will, Senior Judge of the United States District Court for the Northern District of Illinois, respectfully requests that this Court issue a writ of mandamus or prohibition to the respondent judges prohibiting them from enforcing that portion of the September 11, 1989 order of the United States Court of Appeals for the Seventh Circuit in *In re Folding Carton Antitrust Litigation*, No. 88-2438, which purports to vacate in part the district court's approval of the parties' settlement of the *Folding Carton* class action. The order should be reversed because the court of appeals lacked jurisdiction to enter such an order since there was no case or controversy and no party with standing to object to the settlement before the court.

The issuance of an extraordinary writ is necessary to enforce this Court's supervisory authority over the lower federal courts by reconfirming that judicial intervention is proper only where appropriately sought by an interested party. To permit the court of appeals' decision to stand uncorrected would countenance unauthorized judicial action

in derogation of the efforts of the parties to achieve a consensual resolution of their dispute and of the efforts of the district court to facilitate that resolution.

Issuance of the writ is necessary also to prevent serious damage to the class action system. Amicable settlement of class actions by all interested parties is a socially desirable result. Yet the decision below would seriously interfere with the settlement process by requiring the parties to anticipate the *sua sponte* objections of an appellate court with no case or controversy before it, but with opinions of its own as to how settlement funds should be distributed.

For the same reasons, petitioner, in the alternative, requests that the Court issue a writ of certiorari to review the September 11, 1989 order, and that the Court reverse that portion of the order that vacates in part the district court's approval of the parties' settlement.

OPINIONS BELOW

The court of appeals issued the order from which relief is sought on September 11, 1989. It is reproduced as Appendix A. The court of appeals had issued a similar order on August 9, 1989, along with an opinion on the same subject, published at 881 F.2d 494. The August 9, 1989 opinion is reproduced as Appendix B and the order is reproduced as Appendix C. The August 9, 1989 order was vacated in another order of September 11, 1989, which is reproduced as Appendix D.[2]

A subsequent court of appeals order denying petitioner's Petition for Correction of Opinion, Rehearing and Suggestion for Rehearing In Banc, issued September 15, 1989, is reproduced as Appendix E. Excerpts from petitioner's petition to the court of appeals are made part of this Petition as Exhibit 1 because they contain arguments in support of this Petition and enumerate reasons why this Petition should be granted.

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[2] No new opinion accompanied the September 11, 1989 orders, and the August 9, 1989 opinion apparently continues to reflect the court's reasoning.

The following relevant opinions and orders from earlier phases of this litigation are also reproduced as appendices: the court of appeals' order issued September 5, 1984 (Appendix F); the court of appeals' opinion in support of that order, which is reported at 744 F.2d 1252 and was also issued September 5, 1984 (Appendix G); the district court's order issued February 17, 1983 (Appendix H); the district court's opinion in support of that order, which is reported at 557 F. Supp. 1091 and was also issued February 17, 1983 (Appendix I); and the district court's opinion, issued May 24, 1988, which led to the court of appeals' August 9, 1989 opinion and which is reported at 687 F. Supp. 1223 (Appendix J).

JURISDICTION

The court of appeals issued its order purporting to vacate the settlement on September 11, 1989. On September 15, 1989, the court of appeals denied petitioner's Petition for Correction of Opinion, Rehearing and Suggestion for Rehearing In Banc (see Exhibit 1), which petitioner had filed on August 23, 1989 following the court of appeals' issuance of its August 9, 1989 opinion.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1651(a) (1982) and 28 U.S.C. § 1254(1) (1982).

We believe that the proceeding below should properly be considered a mandamus or prohibition action against Judge Will: It was not an appeal because there was no appellant, and the court of appeals' order required the district court to vacate the settlement while prohibiting Judge Will from acting as judge. The court of appeals itself stated that the proceeding "[a]rguably . . . could be regarded as a mandamus action." *Houck on Behalf of the United States* v. *Folding Carton Administration Comm.*, 881 F.2d 494, 496, Appendix B at 2b. In that event, as a party below, Judge Will would seek review by certiorari, as he did in *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655 (1978).[3]

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[3] We note also that the court of appeals accepted, considered and rendered decision upon Judge Will's Petition for Correction of Opinion,

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However, the proceeding below was captioned as an appeal, and a motion formally to redesignate it as a mandamus action was denied.[4] Accordingly, if the technical status rather than the substance is to govern, petitioner, as a precautionary matter, also has, in the alternative to his Petition for certiorari, petitioned for a writ of mandamus or prohibition from this Court to review the respondent circuit judges' purported exercise of judicial authority without jurisdiction. This was the procedure adopted in *In re Robson* (No. 84-1127) (U.S. Jan. 15, 1985), *cert. dismissed*, 471 U.S. 1120 (1985).

Judge Will's status as a petitioner here is a reflection of the unusual things that the court of appeals did—it undertook to vacate a settlement to which no party objected, in the absence of any case or controversy, to transfer settlement funds from the law schools selected by the parties to some other public interest institution more to its liking. It then ousted Judge Will of his jurisdiction and discretion to oversee the settlement. The court of appeals' unusual and unlawful actions have required the filing of this Petition.

STATEMENT OF THE CASE

This Petition arises from one of the more bizarre and unseemly judicial disputes of recent years. It grows out of a massive litigation that began in 1976, when a number of class actions and other civil complaints were filed against certain manufacturers of folding cartons, alleging that they had conspired to fix prices in violation of the Sherman Act, 15 U.S.C. §§ 1-7 (1982 & Supp. 1986). The class actions

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Rehearing and Suggestion for Rehearing In Banc. No party objected to that petition on the ground that Judge Will lacked standing as a party or on any other ground. Under the jurisprudence of this Court, Judge Will is entitled to petition for a writ of certiorari. *See Ex parte Cutting*, 94 U.S. 14, 20-21 (1876).

[4] Petitioner, therefore, also would seek, by this Petition, a writ of certiorari reversing the court of appeals' denial of the motion to redesignate, which was, in substance and effect, a denial of an intervention motion. 28 U.S.C. § 1254(1); *International Union, United Auto., Aerospace & Agric. Workers, Local 238* v. *Scofield*, 382 U.S. 205, 208-09 (1965).

were consolidated in the United States District Court for the Northern District of Illinois, and, because of the complexity and magnitude of the proceeding, two judges, the Honorable Edwin A. Robson and the Honorable Hubert L. Will, were appointed to preside over what became known as *In re Folding Carton Antitrust Litigation.*[5]

During the ensuing 10 years of the litigation, until Judge Robson's death in 1986, Judges Robson and Will entered 53 administrative orders and 80 additional pretrial orders in the *Folding Carton* litigation, containing a total of 416 separate decisions. Judges Robson and Will authored eight published opinions and several additional unpublished opinions. The docket sheet was 338 pages long. *See* Remarks of the Honorable Hubert L. Will before the United States District Court for the Northern District of Illinois, Eastern Division, at the Meeting in Special Ceremonial Session in Memory of the Honorable Edwin A. Robson, 660 F. Supp. LXXIII, LXXX (Dec. 15, 1986).

On September 19, 1979, Judges Robson and Will approved the parties' proposed settlement of the *Folding Carton* litigation. The settlement was, at the time it was approved, the largest antitrust class action settlement in history. Twenty-four defendants paid a total of approximately $200 million into a settlement fund administered by the district court with the assistance of an Administration Committee of lawyers.[6]

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[5] *See* 687 F. Supp. 1223 (N.D. Ill. 1988) (Appendix J); 557 F. Supp. 1091 (N.D. Ill. 1983) (Appendix I); 84 F.R.D. 245 (N.D. Ill. 1979).

[6] The Administration Committee was originally appointed for the purpose of reviewing all of the attorneys' fees applications submitted in connection with the litigation and to recommend reasonable awards to the more than 50 law firms from across the country that had participated in the litigation on behalf of the plaintiff class. The Committee eventually recommended payment of fees totalling $13 million, 23 percent less than the aggregate amount requested and less than seven percent of the settlement fund. After a hearing on the Committee's recommendation, Judges Robson and Will approved the settlement. None of the law firms appealed from the judges' decision. Because of the Administration Committee's excellent handling of the attorneys' fees issues, Judges Robson

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Three years after the approval of the settlement, following payment of all known claims and expenses, a residue of approximately $6 million remained in the settlement fund. The district court solicited recommendations for disposition of the residue from all parties and the Administration Committee. After briefing, at the recommendation of the Committee, Judges Robson and Will exercised their discretion to approve a *cy pres* use of the residual fund to establish a foundation for research on complex class actions and antitrust litigation, *see* 687 F. Supp. at 1224-25, Appendix J at 3j.

Six of the 2,700 plaintiff class members who had been paid out of the settlement fund and two of the defendants objected to that proposal, arguing that the residue should be distributed to the class members or returned to the defendants. The district court rejected those arguments, and on February 17, 1983, Judges Robson and Will ordered, among other things, that any balance of the settlement fund that remained after one year's time, during which late claims would be paid, should be used to establish the aforementioned foundation.[7] The objecting parties appealed.

(footnote continued from preceding page)

and Will asked the Committee also to handle the plaintiff class members' claims.

[7] Judges Robson's and Will's approval of the Committee's recommendation was consistent with other courts' approvals of uses of unclaimed funds for purposes other than compensation of injured parties that also serve the purposes of the antitrust laws. For example, in *State of West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710, 728, 733-34 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079, 1084 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971), the court approved a settlement that allocated to certain state attorneys general the unclaimed surplus of an antitrust litigation settlement fund for use in public interest projects that would benefit consumers who might have been injured by the defendants' unlawful actions. Of particular interest, in *In re Corrugated Container Antitrust Litigation*, (M.D.L. No. 310) (S.D. Tex.), Judge Singleton, by order of October 6, 1987, distributed some $1.03 million to a group including six law schools, for such use as they determined, including study of the antitrust laws. *See also* 2 H. Newberg, *Class Actions* § 11.20, at 415 n.57 (5th ed. 1985) (citing

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In 1984, the court of appeals upheld the district court's ruling that the appellants had no further entitlement to any disbursements from the settlement fund. At that point, it would have seemed necessary to affirm the district court's judgment. However, *sua sponte*, without suggestion from any party and with no person before it having standing to complain of the district court's order, and no party actually complaining, the court of appeals proceeded to consider the merits of the district court's disposition under the *cy pres* doctrine. The court of appeals stated that the plan to use the funds to establish a research foundation on antitrust and other complex litigation was a "miscarriage of justice and an abuse of discretion," a claim not made by any party before the court. *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252, 1255 (7th Cir. 1984), Appendix G at 4g. The two judges constituting the majority of the panel ordered instead that any residue remaining in the reserve fund after passage of one year "escheat" to the United States pursuant to the court of appeals' understanding of the "spirit" of 28 U.S.C. §§ 2041 (1982 & Supp. 1986) and 2042 (1982).[8] 744 F.2d at 1255-56, Appendix G at 4g.

Several participants, including Judges Robson and Will, petitioned this Court for a writ of mandamus, or, alternatively, for a writ of certiorari, contending that the court of

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Girsh v. *Jepson*, No. 73-652 (E.D. Pa. July 31, 1981) (authorizing distribution of approximately $7,100 from unclaimed securities class settlement fund to law libraries at Temple, University of Pennsylvania, and Villanova law schools); *Sanchez* v. *Lowell Lebermann, Inc.*, No. A-77-CA-198 (W.D. Tex. 1979) (settlement fund residue donated to designated medical center); *Lindy Bros. Builders* v. *American Radiator & Standard Sanitary Corp.*, No. 41774 SC (E.D. Pa. Feb. 28, 1978) (approximately $25,500 from residue of antitrust class settlement fund distributed to University of Baltimore School of Law and Temple University School of Law for needy students)).

[8] Judge Flaum, in a partial concurrence with and partial dissent from the court of appeals' decision, concluded that sections 2041 and 2042 provided no such "escheat" mechanism and that "escheat" to the federal government was not authorized by law. 744 F.2d at 1257, Appendix G at 9g.

appeals had unlawfully substituted its discretion for that of the district court. Petition for Writ of Mandamus, or in the Alternative, Petition for a Writ of Certiorari at 7-10, *In re Robson* (No. 84-1127) (U.S. Jan. 8, 1985), *cert. dismissed*, 471 U.S. 1120 (1985). Judges Robson and Will argued also that the court of appeals had rendered its decision in the absence of any party, case, or controversy: Once the court of appeals had determined that none of the appellants was entitled to further distributions from the fund, there were no parties with standing to challenge the disposition of the residual funds, and therefore no case or controversy. *Id.* at 5.

While those petitions were pending before this Court, all the parties to the class action reached a settlement regarding disposition of the $6 million residue: The funds were first to be used to pay any previously unpaid class members. Any remaining funds were to be divided equally between (1) a pro rata distribution to all class members who previously had been paid, and (2) two or more law schools in the Chicago area for the purpose of funding research projects relating to the antitrust laws and complex litigation and for financial assistance to law students. On March 28, 1985, Judges Robson and Will reluctantly approved this proposed settlement,[9] and the petitions pending before this Court were subsequently voluntarily dismissed as moot, *see In re Robson*, 471 U.S. 1120 (1985).[10]

Over two years later, after distribution pursuant to the settlement of all but $600,000 of the more than $6 million

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[9] Judges Robson and Will were reluctant to approve the settlement because they believed, as they and the court of appeals had held, that class members who had previously received payment should receive no further distribution, and that institutions not only in Chicago but across the country should have the opportunity to apply for grants from the residual funds. But they declined to substitute their preferences for those of the parties as expressed in the settlement agreement. Petition for Correction of Opinion, Rehearing and Suggestion for Rehearing In Banc, Exhibit 1 to this Petition, at 26; *see* 687 F. Supp. at 1227, Appendix J at 8j-9j.

[10] The petitions for certiorari remained pending until after the district court's approval of the settlement.

residue, the United States Government sought to intervene in the case to have the settlement vacated. The basis of the motion was that the court of appeals' prior judgment in 1984 had held that the residue should "escheat" to the federal government and that the settlement was therefore contrary to the law of the case. However, the district court previously had invited the Government on numerous occasions to express its views on the settlement, and the Government repeatedly had declined to assert any objection. For that reason, the district court denied the Government's intervention motion as barred by estoppel. The Government appealed.

The settlement was defended on appeal by the parties who had negotiated it and by the Administration Committee on behalf of Judge Will. A motion was filed to designate the appeal as a mandamus action against Judge Will, to reflect more accurately the absence of any legitimate appellant and the true nature of the proceedings which sought to compel Judge Will to vacate all previous orders approving or implementing the settlement. The court of appeals indicated that "[a]rguably this matter could be regarded as a mandamus action." 881 F.2d at 496, Appendix B at 2b. However, it denied the motion.

On the merits, the court of appeals upheld the petitioner's denial of the Government's intervention motion—the only issue raised by the only appellant in the appeal[11]—stating categorically: "The United States is therefore not a party." 881 F.2d at 502, Appendix B at 14b. It did so even though its September 1984 opinion had "directed" that the residual funds should "escheat" to the Government.

At that point, there was no party objecting to the settlement, no dispute and no controversy. But, instead of remanding the case to the district court to complete the settlement, the court of appeals went on to declare that the

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[11] In a separate docket, the court of appeals also affirmed dismissal of a purported *qui tam* action for lack of subject matter jurisdiction. 881 F.2d at 503, Appendix B at 17b.

grants made to the two law schools pursuant to the settlement agreement were void. The court stated that the grants were in derogation of the mandate in its September 5, 1984 judgment in which it disapproved of the district court's exercise of *cy pres* discretion to use the residual funds to establish a research foundation to study complex cases and the antitrust laws.

The court of appeals further ordered that no attorneys' fees could be awarded for any legal services rendered pursuant to petitioner's order or request in connection with that portion of the settlement related to the law school programs. The court of appeals did, however, apparently create an exception to its edict to permit the law schools whose grants it voided to recoup reasonable attorneys' fees "attributable to their involvement in obtaining the grants now set aside by this court." Appendix A at 2a. The court also ordered that any funds already paid to the law schools be returned.

The case was remanded to the district court for disbursement of the residual funds "for a *cy pres* purpose as determined by the district court," Appendix A at 3a, but with a direction that the "district court shall not disburse any such funds to fund research in the area of antitrust law," Appendix A at 2a. The court of appeals invoked rule 36 of the Seventh Circuit's rules, thereby requiring that the case be assigned on remand to a judge other than petitioner.[12]

Petitioner then filed the Petition for Correction of Opinion, Rehearing and Suggestion for Rehearing In Banc previously referred to and from which excerpts are attached as Exhibit 1 to the Petition. The court of appeals denied the petition on September 15, 1989.

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[12] The case has been assigned on remand to the Honorable Ann C. Williams. She has declined to act on the numerous applications from persons interested in receiving grants from the residue of the settlement fund until this Court's disposition of this Petition has clarified the court of appeals' authority *vel non* to act as it did.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT SHOULD PREVENT THE COURTS OF APPEALS FROM PURPORTING TO DECIDE ISSUES IN THE ABSENCE OF ANY CASE OR CONTROVERSY

It is difficult to imagine a graver threat to the harmonious operation of the lower federal courts than that presented by the court of appeals' peculiarly unjudicial behavior here. At a time when no party, case, or controversy was before it, the court of appeals *sua sponte* proceeded to review a settlement that had been agreed upon by all the parties, approved by the district court, and substantially carried out. It approved part of the settlement, set aside another part which it did not like, and remanded with directions to assign the case to a different district judge.

In particular, the court of appeals concluded that it was an abuse of *cy pres* discretion to provide settlement funds to Loyola University and the University of Chicago for research projects involving study of the antitrust laws and the management of complex litigation. The same court had, of course, previously decided in 1984, at the urging of no litigant, that the money should escheat to the federal government because it was subject to sections 2041 and 2042, title 28, United States Code, dealing with funds unclaimed for more than five years on deposit in federal court.[13] The court of appeals has now apparently abandoned the escheat theory, which, on its analysis, would be "the law of the case," and without explanation now suggests that the funds might be given to the Federal Judicial Center Foundation to facilitate the research and educational work of the Federal Judicial Center.

For good measure, the court of appeals also denied reimbursement to any attorneys who, at petitioner's order or request, negotiated or defended the law school grants. It

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[13] Not having the benefit of argument on the point, the court of appeals apparently was not aware at the time that the funds were *not* on deposit in federal court and were *not* unclaimed, and that the "escheat" statute it cited was, therefore, plainly inapplicable.

further required that the law schools pay back any funds received, remanded the case with instructions that it be heard by a judge other than petitioner, and "retained jurisdiction"—which it did not have in the first place—to assure compliance with its purported mandate.

The court of appeals seems to regard its relation to the residue of the settlement fund as proprietary in nature and subject to its disposition without regard to the limitations imposed by its constitutional function of resolving cases or controversies brought before it by contending parties, and without any obligation to explain its reasoning. The court of appeals is constant in only one thing: the feeling that it is arbitrary to use the proceeds of a settlement of one of the longest and most complex antitrust proceedings to make scholarly inquiry into the need for and the effects of the antitrust laws on the modern economy, and that what appears on its face to be an obviously correct *cy pres* disposition is arbitrary and capricious and cannot be tolerated.

The court of appeals rendered its decision in an opinion notable for its threatening language ("That is not to suggest that district courts and parties to litigation may regard the opinions of this court as merely advisory. . . . [T]hey shall do so at their peril. This court, in appropriate circumstances, will see to the enforcement of its judgments by all means at its disposal," 881 F.2d at 499, Appendix B at 9b), its disdain for the settlement process ("there was a specific direction in the opinion of this court that a certain proposed use of the fund not be carried out. . . . Those directives cannot, in ordinary circumstances, be avoided or ignored by either the district court or by the parties through a settlement or by some other circumventing device," 881 F.2d at 499, Appendix B at 9b), and its peculiar logic ("even if some [plaintiffs] are now overcompensated, their entitlement to an additional share of the Reserve Fund is not without foundation," 881 F.2d at 502, Appendix B at 14b, versus "the creation of the proposed antitrust foundation was inappropriate, a miscarriage of justice, and an abuse of discretion," 881 F.2d at 502, Appendix B at 14b).

What occurred below is not only most unusual; it presents a major threat to the judicial system. A court of appeals, admittedly without jurisdiction, admittedly with no party, case, or controversy before it,[14] nonetheless purported to substitute its views for those of the parties to a settlement. When a court of appeals acts admittedly without jurisdiction, there is no limit to its ability to distort the ends of justice. We submit that this Court should prevent that kind of appellate lawlessness from interfering with the efforts of parties and district judges to achieve consensual resolutions of matters in litigation.

The published reports include very few instances in which a court of appeals—which is the penultimate court of review, and, in most civil cases, the ultimate court of review in the federal judicial system—has recognized that a matter was beyond its jurisdiction and yet purported to render a decision on it. This Court has been willing in those few instances to exercise its supervisory authority to prevent such abuses of the judicial system. It should do no less here.

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[14] Federal courts lack jurisdiction over matters that do not present an actual case or controversy. U.S. Const. art. III; *see Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975); *SEC* v. *Medical Comm. for Human Rights*, 404 U.S. 403, 406-07 (1972). The presence of a case or controversy must be tested at each level of the review process, and a court must decline to render a decision whenever it becomes clear that a case or controversy no longer exists. *See Sosna* v. *Iowa*, 419 U.S. 393, 402 (1975); *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974). A matter that presents a justiciable case or controversy at the outset may become moot by intervening circumstances, such as the parties' settlement of their dispute. *Lake Coal Co.* v. *Roberts & Schaefer Co.*, 474 U.S. 120 (1985); *Hammond Clock Co.* v. *Schiff*, 293 U.S. 529, 529-30 (1934); C. Wright, A. Miller & E. Cooper, 13A *Federal Practice and Procedure* § 3533.2, at 233-35 (1984 & Supp. 1989); *see Deakins* v. *Monaghan*, 484 U.S. 193, 200 (1988) (mootness caused by respondents' representations that they no longer would pursue certain federal claims makes appropriate entry of order vacating lower court judgment).

That is precisely what happened here. All the parties that had objected to the district court's previous order reached an accord. They entered into a stipulation that specified how the residue would be distributed. The petitions for certiorari then pending before this Court were withdrawn. There remained no case or controversy to be adjudicated.

For example, in *Christianson* v. *Colt Industries Operating Corp.*, 108 S. Ct. 2166 (1988), the Court applied the "age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists. . . ." 108 S. Ct. at 2178. In that case, the Federal Circuit had determined that it lacked jurisdiction to hear the appeal, but nevertheless reached the merits and decided the case "in the interest of justice." *Christianson* v. *Colt Indus. Operating Corp.*, 822 F.2d 1544, 1559 (Fed. Cir. 1987), *judgment vacated*, 108 S. Ct. 2166 (1988).

This Court granted certiorari and reversed: A court of appeals must not be permitted to bend the jurisdictional rules, even though doing so would have alleviated the litigants' burden by resolving a lingering dispute.

The need to grant the writ is even stronger in the instant case, where the court of appeals has acted beyond its jurisdiction to purport to resolve a dispute where none existed.

Similarly, in *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981), the Court granted certiorari to reverse a court of appeals' ruling that purported to apply a jurisdictional rule prospectively in order to reach the merits of the appeal before it "[i]n fairness to the appellant in the instant case." *Id.* at 372-73 (quoting *In re Multi-Piece Rim Prod. Liab.*, 612 F.2d 377, 378-79 (8th Cir. 1980)). The case was not "final," however, within the meaning of 28 U.S.C. § 1291, and it did not meet the test for review as a collateral order under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). 449 U.S. at 378, 379. This Court reaffirmed that "[a] Court lacks discretion to consider the merits of a case over which it is without jurisdiction. . . . [B]ecause the Court of Appeals was without jurisdiction to hear the appeal, it was without authority to decide the merits." *Id.* at 379 (footnote omitted).[15] *See also Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 440-41 (1985).

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[15] In a footnote, the Court also disapproved of two other courts of appeals' purportedly prospective rulings in cases that were not "final"

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The decision below threatens the prohibition against the federal courts' adjudication of matters over which they lack jurisdiction, which safeguards many interests. Such a prohibition ensures that there will be adversity over the issues in the case and an opportunity for the court to hear well-developed arguments on both sides of the issues from parties whose interests are at stake in the outcome of the litigation. *See Flast* v. *Cohen*, 392 U.S. 83, 94-95, 101 (1968) (article III jurisdictional aspect of standing requirement relates to "whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution"); *Chicago & Grand Trunk Ry. Co.* v. *Wellman*, 143 U.S. 339, 344-45 (1892) (trial court correctly refused to instruct jury that state statute was unconstitutional on basis of minimally developed record in "friendly suit"). The alternative, as reflected in what happened below, is adversity created by a court of appeals, deciding issues unbriefed and unargued, and granting relief unsought and undesired. The result is unjust and unseemly, and this Court should put a stop to it.

The curious character of what the court of appeals did here is reflected in the probable absence of adversity with respect to this Petition. No party to *In re Folding Carton Antitrust Litigation* objected in the court of appeals to the district court's approval of the settlement agreement; and, while others are likely to join us in petitioning this Court for relief, no party, to our knowledge, may seek to oppose this Petition. The only persons with opposing views appear to be the respondent circuit judges, who, under this Court's rules, are not even required to appear on their own behalf or to respond to this Petition. S. Ct. R. 27.2.(b). Normally, the action against which an extraordinary writ is sought is

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within the meaning of 28 U.S.C. § 1291. 449 U.S. at 379-80 n.15 (disapproving of *Armstrong* v. *McAlpin*, 625 F.2d 433, 441-42 (2d Cir. 1980), and *Melamed* v. *ITT Continental Baking Co.*, 592 F.2d 290, 295 (6th Cir. 1979) ("[t]o the extent that the rationales of those cases would allow a court to agree to decide the merits of a case over which it is without jurisdiction")).

defended by the party to the litigation whose interests are served by denial of the writ.[16] *See United States* v. *Haldeman*, 559 F.2d 31, 138 (D.C. Cir. 1976) (commenting upon practice under parallel rule 21(b) of the Federal Rules of Appellate Procedure), *cert. denied*, 431 U.S. 933 (1977); *Rapp* v. *Van Dusen*, 350 F.2d 806, 812 (3d Cir. 1965). No party to *In re Folding Carton Antitrust Litigation* stands in such a position. Thus, if respondents do not file a response, this Petition would be unopposed.

On the other hand, if the respondent circuit judges do appear on their own behalf, that will emphasize that they have no proper concern as to the pending matter of a nature related to their proper judicial function as judges of cases or controversies between parties litigating before them. Instead, they are pursuing individual interests not within their judicial powers and are acting as interlopers who, acting beyond their jurisdiction, should be restrained from such unconstitutional activity. *Ex parte Young*, 209 U.S. 123, 143 (1908).

* * *

The court of appeals' unswerving conviction that there remains nothing in the areas of complex class actions and antitrust litigation to study may stem from its removal from the day-to-day rigors of managing such litigation. It may be that class action issues and complex antitrust litigation issues, when they are neatly bundled and summarized in appellate briefs, seem eminently manageable and undeserving of further study. But the perspective of district judges such as Judges Robson and Will, who observed the demands of complex class action litigation from the front lines, is different. Judges Robson and Will perceived the usefulness

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[16] For example, in *In re Robson* (No. 84-1127) (U.S. Jan. 8, 1985), Judges Robson's and Will's petition to this Court for a writ of mandamus or, in the alternative, for a writ of certiorari was opposed by the parties who had unsuccessfully appealed from the judges' order regarding disposition of the residual funds.

of further study of complex antitrust and class action litigation in order further to streamline that process while ensuring fairness for all the litigants and class members. Judges such as they are uniquely qualified to identify the tools they need to do their difficult job. They should not arbitrarily be denied those tools.

We would respectfully note, as is well known to this Court, that Judge Will has given the United States over 28 years of outstanding service as a judge of the district court, and that he views the court of appeals' action here as one of the most serious threats to the judicial system that he has ever encountered. Twice before, Judge Will has sought and received relief from this Court against incorrect and dangerous appellate actions, *Will* v. *United States*, 389 U.S. 90 (1967); *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655 (1978), and those decisions have contributed significantly to the development of federal procedural principles. We respectfully urge the Court once more to appreciate the gravity of the issue raised by Judge Will, and to grant the writ sought.

II. THE WRIT SHOULD BE GRANTED TO CLARIFY THE ROLE OF A COURT OF APPEALS IN REVIEWING A DISTRICT COURT'S APPROVAL OF A CLASS ACTION SETTLEMENT AGREEMENT

Most class actions are resolved by settlement, and one of the objectives of class treatment is to structure all of the affected interests into a framework that permits them to bargain to a fair compromise. The district court then has the duty to review and approve a proposed settlement to assure fairness to absent class members.[17] It is of vital importance

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[17] Although the Federal Rules of Civil Procedure provide no standards for district courts to apply in reviewing and approving class action settlements pursuant to rule 23(e), jurisprudential guidelines have evolved for that purpose. In general, the proposed settlement must be "fair, adequate, and reasonable" when balanced against the plaintiff's likelihood of prevailing at trial and winning an award of damages. *In re Flight Transp. Corp. Sec. Litig.*, 730 F.2d 1128, 1135 (8th Cir. 1984), *cert. denied*, 469 U.S. 1207 (1985); *see Protective Comm. for Indep. Stockholders of*

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to the efficient administration of justice that class settlements be facilitated and encouraged.

The decision below threatens to impose a major new obstacle to this process. The court of appeals, in the absence of any objection from anyone with standing to object, vacated selected portions of a settlement agreement already largely carried out because it thought leftover funds ought to go to one sort of research institution rather than another. It also denied fees to attorneys who, pursuant to petitioner's orders and instructions, carried out the settlement, and further ordered that the case be reassigned to a judge other than the surviving judge who had presided over the case for thirteen years and who oversaw the settlement discussions.

We respectfully suggest that this new impediment to class settlements—the need to anticipate the *sua sponte* objections of an opinionated court of appeals—is more than the system can bear. Parties and their counsel should be encouraged to settle their disputes, not criticized and fined for their efforts.[18] The writ should be granted to prevent serious damage to the class action system.

Until now, the circumstances in which a court of appeals could vacate a class action settlement were narrowly circumscribed and legally clear. A settlement must adequately protect those whose rights are affected but who have not

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TMT Trailer Ferry, Inc. v. *Anderson*, 390 U.S. 414, 424-25 (1968); *Walsh* v. *Great Atl. & Pac. Tea Co., Inc.*, 726 F.2d 956, 965 (3d Cir. 1983). A district judge does not have carte blanche, however, to rewrite the terms of the settlement to make them, in his or her view, more fair, more adequate or more reasonable than those that the parties have negotiated among themselves. As with respect to the law of contracts in general, "courts may not make a contract for the parties." *See Imperial Fire Ins. Co.* v. *Coos County*, 151 U.S. 452, 462 (1894); *Davies* v. *Continental Bank*, 122 F.R.D. 475, 478 (E.D. Pa. 1988). A district court's authority is limited to approving or rejecting the settlement as a whole.

[18] *See, e.g., Maher* v. *Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983) (in view of policy favoring shareholder derivative suit settlements, courts do not "lightly reject such settlements"); *see also Weinberger* v. *Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983).

been actively involved in the litigation. A settlement may not contain a gross procedural defect, for example, lack of adequate notice to the interested parties, *see, e.g., Weinberger* v. *Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983), or a flagrant substantive defect, such as authorization of continued illegal conduct, *see, e.g., Gautreaux* v. *Pierce*, 690 F.2d 616, 626 (7th Cir. 1982) (alleged illegality must be apparent on face of agreement in order to render approval by district court improper). A district court that adhered to these guidelines could be reasonably certain that its efforts to aid the parties in resolving their disputes would not be subject to reversal.

But the ruling below, if it is allowed to stand, would dramatically upset settled practice in this area. The court of appeals has asserted authority to review the merits of discretionary allocations of settlement funds to which all parties agreed and no party objected. It asserted a right to substitute its judgment for that of the parties to the settlement. *See, e.g., Maher* v. *Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983); *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 758-59 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1385 (D. Md. 1983). Petitioner is unaware of any precedent supporting this extraordinarily dangerous *sua sponte* action on the part of the court of appeals.[19]

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[19] The court of appeals' September 11, 1989 order does not indicate what standard of review it applied in reversing the district court. Assuming that it applied the deferential abuse of discretion standard, it did so incorrectly. That standard preserves to the district court the broadest possible range of action, within the confines of the law and judicial duty. The abuse of discretion standard, as the name indicates, preserves to the courts of appeals the power to correct abuses of that broad range of freedom of action. The prejudice or injury that may be alleged by an appellant or petitioner is normally an indication that such an abuse may have occurred. *E.g., Barona Group of Capitan Grande Band of Mission Indians* v. *American Management & Amusement, Inc.*, 840 F.2d 1394, 1408 (9th Cir. 1987) (applying abuse of discretion standard), *cert. dismissed*, 109 S. Ct. 7 (1988).

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The court of appeals' September 11, 1989 order contains no real rationale for its decision, but apparently it relied in some part upon the mandate rule, which requires a lower court's obedience to the rulings of a higher court, *see In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895). Appellate mandates have never been viewed as an impediment to settlement, and the contrary rule below would effectively eliminate normal settlement discussions which customarily involve terms different from those mandated by judicial decision. For that reason, the decision below will make settlements—a socially desirable conclusion of litigation—far more difficult, if not impossible.[20]

Further, the court of appeals' application of the mandate rule to void the parties' settlement is inconsistent with this Court's holdings in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), and *Deakins* v. *Monaghan*, 484 U.S. 193 (1988). *Munsingwear* stated that an appellant deprived of

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Here, no party alleged prejudice or injury. No party appealed from the district court's approval of the settlement. Yet the court of appeals overturned the district court's exercise of discretion and substituted its own judgment. To be sure, it remanded the matter to the district court so that another district court judge—anyone but petitioner—could make another try at exercising the discretion afforded to district court judges in a way that would satisfy the court of appeals, with the court of appeals suggesting distribution to the Federal Judicial Center Foundation and purporting to reserve jurisdiction to review any plan of distribution approved by the new district judge. The court of appeals has made clear that, for its own reasons, it does not want any funding earmarked for the study of antitrust or complex litigation. But under the Constitution, it has no power to apply its desires unless presented with a case or controversy over which it has jurisdiction.

[20] The court of appeals' application of the mandate rule was curiously uneven. It approved the settlement's noncompliance with the mandate's order that the residue "escheat" to the United States pursuant to 28 U.S.C. §§ 2041 and 2042 and that none of the parties to the lawsuit were entitled to any further distributions from the settlement fund. On the other hand, it apparently voided and barred the law school grants not only for the study of the antitrust laws, but for all purposes contemplated in the settlement agreement, including the study of the performance of juries.

his or her opportunity for review of a civil judgment due to intervening developments that render a case moot need not suffer the preclusive effects of the unreviewed judgment. 340 U.S. at 39-40. In order to preserve the appellant's opportunity to relitigate issues decided in the unreviewed judgment, the *Munsingwear* Court held that the district court's judgment should be vacated, upon motion to the court of appeals by the party who seeks to escape the preclusive effect of that judgment, with instructions to the district court to dismiss all the relevant portions of the complaint. *Id.* at 39.

In *Deakins*, this Court reaffirmed *Munsingwear* and held that "[w]hen a claim is rendered moot while awaiting review by this Court, the judgment below should be vacated with directions to the district court to dismiss the relevant portion of the complaint. [Citation omitted.] *This disposition strips the decision below of its binding effect.*" 484 U.S. at 200 (emphasis supplied). *Deakins* went beyond *Munsingwear* to establish that a party's own representations about his or her intentions to pursue claims could render a case moot—just as could intervening developments outside the parties' control—and make it appropriate to vacate the lower courts' judgments to eliminate the preclusive effect that they otherwise would have. Logically, this principle must extend to settlements in which both parties abandon litigation, especially where, as here, that agreement is recorded in a court-approved stipulation and settlement agreement. Indeed, it is the longstanding practice among the federal courts of appeals, when a case is settled pending appeal, to vacate the opinion and judgment of the district court. *See Federal Data Corp.* v. *SMS Data Prods. Group, Inc.*, 819 F.2d 277, 279-80 (Fed. Cir. 1987); *Kennedy* v. *Block*, 784 F.2d 1220, 1225 (4th Cir. 1986); *Nestle Co.* v. *Chester's Mkt., Inc.*, 756 F.2d 280 (2d Cir. 1985) (appeal not mooted by settlement, but balance of interests required entry of order to vacate lower court judgment).

The Seventh Circuit has declined to follow this practice. *See, e.g., In the Matter of Memorial Hosp. of Iowa County,*

Inc., 862 F.2d 1299 (7th Cir. 1988). Granting the writ in the instant case would provide this Court with an opportunity to resolve this apparent conflict and bring the Seventh Circuit into line with other judicial circuits.

Admittedly, when, pursuant to the petitioners' motions, this Court dismissed the petitions for certiorari in an earlier stage of the litigation in 1985, it did not enter an order pursuant to *Munsingwear* directing that the lower courts' judgments be vacated. But that action predated *Deakins*, which clarified that a *Munsingwear* order could be appropriate in circumstances in which the petition for certiorari became moot for reasons within the parties' control. The court of appeals' order has thus reinjected uncertainty in an area that this Court has taken pains to clarify. The writ should be granted to uphold the vitality of *Munsingwear* and *Deakins*.[21]

CONCLUSION

The court of appeals made five critical errors:

(1) It exceeded its jurisdiction by *sua sponte* reviewing and vacating in part a settlement agreement about which there was no case or controversy;

(2) It exceeded any reasonable discretionary authority by approving part of the settlement which was directly contrary to the holding of a prior panel, but vacating

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[21] Moreover, the court of appeals' September 5, 1984 judgment lacked preclusive effect to interdict the district court's approval of the parties' settlement because it was not final at the time that the district court reviewed and approved the settlement. At that time, the parties' petitions for certiorari were pending before this Court; they were not dismissed until after the district court had approved the settlement. Therefore, at the relevant time, the court of appeals' judgment lacked the finality that is essential to give a judgment preclusive effect. *See Airline Stewards and Stewardesses Ass'n, Local 550* v. *Trans World Airlines, Inc.*, 630 F.2d 1164, 1167-69 (7th Cir. 1980), *aff'd on other grounds sub nom. Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *cf. Walling* v. *Reuter Co.*, 321 U.S. 671, 677 (1944); *United States* v. *Roemer*, 514 F.2d 1377, 1381 (2d Cir. 1975).

another part which it deemed inconsistent with that holding;

(3) It erred in denying the motion to redesignate the proceeding below as a mandamus action, which the party commencing the proceeding—the Government—agreed was an appropriate way of enforcing the court of appeals' prior mandate, *see* 881 F.2d at 496, Appendix B at 2b;

(3) It abused its discretion in denying recovery of fees by attorneys for services performed pursuant to a court order or request; and

(4) It improperly applied circuit rule 36 to assign the matter to a different judge of the district court, unfamiliar with the case, to the exclusion of the surviving presiding judge who has overseen the *Folding Carton* litigation for the past thirteen years.

For the reasons set forth above, these errors are extremely serious, and a great threat to the judicial system.

The Court should issue the writ of mandamus or prohibition sought by this Petition, or, in the alternative, the writ of certiorari. In the event that this Petition is unopposed, we respectfully suggest that summary reversal would be in order.

Respectfully submitted,

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December 8, 1989

EXHIBIT 1

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 88-2438

In re: Folding Carton Antitrust Litigation Appeal of United States of America	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. MDL 250 Hubert L. Will, *Judge*

PETITION FOR CORRECTION OF OPINION, REHEARING AND SUGGESTION FOR REHEARING IN BANC

[EXCERPTS]

....

REASONS FOR GRANTING THE PETITION

....

I. *The Panel's Ruling upon the Validity of the Settlement Agreement and the District Court's Orders Approving and Implementing It Exceeded This Court's Jurisdiction.*

The threshold issue in this case, No. 88-2438, was the validity of my order of May 24, 1988 denying the government leave to intervene at that late date for the purpose of challenging an order entered by Judge Robson and me in March 1985 reluctantly approving the settlement to which all the parties had agreed, and to which the government, though not a party, but with a possible fiduciary interest by virtue of this court's decision in *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252 (7th Cir. 1984) ("*Folding Carton I*"), had stated it had no objection.

The panel disposed of that threshold question by denying the government's motion and categorically stating, "The United States is therefore not a party." *In re Folding Carton Antitrust Litigation*, No. 88-2438, slip op. at 15 (7th Cir. August 9, 1989). At that point, there were no parties, no case or controversy and no one objecting to the settlement before the court. Accordingly, the court had no jurisdiction. [Citations omitted.] The proceedings were concluded and, whether designated an appeal or an action for a writ of mandamus, should properly have been forthwith dismissed.

When there is no party objecting to the settlement nor any party, case or controversy before the court, appellate courts do not have jurisdiction or authority *sua sponte* to review settlements to see whether or not they approve of them.[1] ....

All of the opinion, other than the denial of the government's right to intervene, is an advisory opinion which was beyond the court's jurisdiction and authority. It should be stricken and withdrawn.

II. *The Panel Erred in Approving Part of the Settlement and Disapproving Another Part.*

....

In *Folding Carton I*, ... [t]he panel reversed our holding that under the *cy pres* doctrine any remainder in the settlement fund should be used for antitrust research and held...that 28 U.S.C. §§ 2041 and 2042...were applicable.

Counsel for the plaintiff class members then filed a petition for a writ of certiorari in the Supreme Court asserting a number of errors....

Judge Robson and I through counsel filed a petition for an original writ of mandamus or in the alternative for a writ of certiorari asserting...that the court had exceeded its appellate authority and proper role by ordering, at a time when it was uncertain that there would be any future remainder and

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[1] The cases we have found holding that courts retain jurisdiction to enforce their judgments are all inapposite. In each, one or more parties or beneficiaries of the judgment was objecting that the judgment was not being carried out. Accordingly, none are authority for a court *sua sponte* reviewing a settlement to which no party or beneficiary is objecting.

without any basis in the record or a hearing, a disposition of such remainder that none of the parties had sought or wanted....

While the petitions were pending in the Supreme Court, the parties negotiated a settlement. It was presented to Judge Robson and me, and we expressed strong reservations about it. It provided that half of any funds remaining after the payment of all claims and expenses should be paid to the members of the plaintiff class. We had already held, and the panel in *Folding Carton I* had unanimously agreed, that the plaintiff class was not entitled to any further payment. Our second objection was that it limited distribution of the other half to the six Chicago-area law schools when we felt that, since the fund represented a return of monies received by the defendants from nationwide sales, it should be available to a much broader group. Finally, the settlement agreement contemplated the withdrawal of all petitions pending in the Supreme Court. Judge Robson and I were hopeful that the Court would take the case and resolve what we believed were very important questions raised by and errors in the *Folding Carton I* opinion. Counsel for the parties strongly urged that we approve the settlement, pointing out that all the parties had joined in it, that the government had no objection to it, and that we should not force them to gamble on whether the Supreme Court would take the case. After a hearing, we determined that, under all the circumstances, the settlement was fair and reasonable and approved it effective April 1, 1985.

Thereafter,...we proceeded to implement the settlement. Notices were sent out and published resulting in some ninety-seven late-late claims being filed. The members of the Committee reviewed the claims and held a number of hearings at which claimants sought to justify their claims and representatives of the plaintiff class objected. The Committee ultimately made recommendations to the court which we modified slightly before finally, on September 16, 1986, approving the payment of some $3,670,000 to late and late-late claimants.

After that payment, there remained some $3,600,000 in the settlement fund. Of that, approximately one-half was distributed pro rata to the plaintiff class members as the settlement provided. At the same time, the six Chicago-area law schools were invited to and did file grant applications.... After a great deal of effort, written agreements were prepared with Loyola University Law School and the University of Chicago Law School and, Judge Robson unfortunately having died, I approved the two proposals.

The grant to Loyola was $1,200,000, the income from which was to be used to establish and maintain a unique Center for Antitrust Law in the Public Interest.... The grant of $156,000 to the University of Chicago Law School was to enable Professor Hans Zeisel, the foremost expert on the American jury, to study the functioning and performance of juries in all types of complex cases. More than $450,000 then remained for distribution to one or more of the other four law schools.

...The panel now holds that it was an abuse of discretion and an improper application of the *cy pres* doctrine to have made these two grants. I submit that, on the contrary, they are classic examples of the application of that doctrine. The funds here involved arose out of the settlement of a massive antitrust action. They represent a portion of the monies obtained by the defendants from the plaintiff class members and the general public pursuant to a price-fixing conspiracy which worked to the detriment of unknown numbers of consumers and to which officers of a number of the defendants pleaded guilty or nolo contendere. It is difficult to visualize a more appropriate *cy pres* use of those funds....

....

Once again, a panel of this court, without any foundation or hearing, has determined that Judge Robson and I, in approving the settlement, and I, in approving the two grants, abused the broad discretion which the panel acknowledges we had by authorizing the most logical *cy pres* use of the funds here involved. More important, this panel is holding that the parties, in settling their case, were prohibited from agreeing that the funds be used for anything relating to

antitrust. This is particularly incongruous, since the panel approves the provision in the settlement agreement for the payment of $1,800,000 to the plaintiff class, notwithstanding that it represented a reversal of the prior unanimous panel of this court and Judge Robson and my holdings that they were entitled to no further payment.

The panel's opinion cites no authority for the proposition that parties, in settling a case, may agree to modify some portions of the judgment or mandate being settled but that there are others which are so sacred and inviolate they may not be modified....

Vacating the grant to the University of Chicago Law School to enable Professor Zeisel to study the functioning of juries in complex cases is even more inexplicable and incongruous. By no stretch of language or imagination is that grant in conflict with *Folding Carton I.* The question of jury performance in complex cases has been and continues to be of great concern.... These include class actions, securities fraud, aircraft disaster, patent, complex commercial transactions, etc. including an occasional antitrust case. Whether Professor Zeisel will find an antitrust case to include in his study is conjectural....

....

...The settlement and the grants made thereunder were classic applications of the *cy pres* doctrine and should not be set aside.

III. *The Panel Improperly Denied the Motion to Designate the Case as a Mandamus Proceeding.*

In this proceeding, the government sought an order from this court commanding me to grant it leave to intervene in the case below and commanding me to vacate the orders Judge Robson and I had entered approving and implementing the portions of the settlement agreement providing for the distribution of any balance in the settlement fund after the payment of late-late claims and expenses. By any standard, that is a mandamus action, as evidenced by the absence of any parties designated as "appellant" or "appellee". The panel's opinion acknowledges that it could be.

The government initially identified it as such and did not dispute that it was.

....

...If the panel had recognized that this was a mandamus action it would certainly have realized, when it ruled the government was not entitled to intervene, that there was no longer any party, case or controversy before it and that the case should be dismissed.

....

IV. *The Panel Erred in Prohibiting Compensation for Services and Reimbursement of Expenses to Counsel for Work Performed Pursuant to Either a Court Order or Request.*

The opinion is also in error by prohibiting the payment of any fees or reimbursement of any expenses to the members of the Administration Committee for their work in assisting in carrying out that portion of the settlement which the panel has found improper.... Denying them compensation and reimbursement for carrying out orders or requests of a court is punitive and unjust if not invalid. [Citation omitted.]

The members of the Administration Committee were literally indispensable to the effective handling of this massive antitrust case. They provided a host of necessary services, reviewing, holding hearings and making recommendations on more than 3,000 claim applications, which resulted in the distribution of more than $200,000,000, and more than fifty fee applications, which resulted in their reduction from approximately $17,000,000 to $13,000,000, all without an appeal. They represented Judge Robson and me in *Folding Carton I* in this court and in the Supreme Court as well as in these proceedings. They handled most of the discussions and negotiations with the representatives of the six law schools. There is no way Judge Robson and I could have handled the Folding Carton antitrust litigation without them.

....

...These outstanding counsel deserve better treatment from the courts for the extraordinary services they have rendered.

V. *The Panel Erred in Invoking Rule 36 and Remanding the Case for Assignment to Another Judge.*

....

At this point, I have presided over the collection and distribution of more than $220,000,000. I find it disturbing that the court should find me not qualified to complete the task. I also find very disturbing the suggestion that *we* tried to avoid part of the opinion in *Folding Carton I*, and that *we* tried "to do substantially the same prohibited thing by changing the form but not the substance." Slip op. at 15.

We did no such thing. The parties came to Judge Robson and me with an agreed settlement. We did not like it but, believing that parties have a right to settle their case and that we could not properly force them to gamble on whether the Supreme Court would take the case, we concluded it was the fairest possible under the circumstances and approved it. I believe that any member of this panel or this court would have done the same. Thereafter, all I did was preside over the implementation of the settlement.

While it is, of course, no reason for not invoking Rule 36 when necessary in the interests of justice, involving a new judge at this time will be grossly unfair to that judge and a great waste of judicial resources....

....

CONCLUSION

The opinion of the court is erroneous in the five respects indicated. It should be corrected and the case dismissed....

....

APPENDICES

APPENDIX A

JUDGMENT—ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
September 11, 1989

Before

HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. RICHARD D. CUDAHY, *Circuit Judge*
HON. MICHAEL S. KANNE, *Circuit Judge*

No. 88-1314

PAUL HOUCK, on behalf of the United States of America, *Plaintiff-Appellant,* vs. FOLDING CARTON ADMINISTRATION COMMITTEE, et al., *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 87 C 1253 Charles R. Norgle, *Judge*

No. 88-2438

IN RE: FOLDING CARTON ANTITRUST LITIGATION APPEAL OF: UNITED STATES OF AMERICA	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. MDL 250 Hubert L. Will, *Judge*

ORDER

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the Motion to Change Title and Designation filed with this court by the Folding Carton Administration Committee on November 10, 1988, is hereby denied.

IT IS ORDERED AND ADJUDGED by this court that the judgment of the said district court denying the motion of the United States of America to intervene is affirmed.

IT IS ORDERED AND ADJUDGED by this court that the grants made from the Folding Carton Reserve Fund to Loyola University and the University of Chicago as provided in the "settlement agreement" approved by the said district court are void and are hereby set aside, and on remand any monies previously disbursed or set aside for disbursal to the aforementioned schools are to be collected into the custody of the district court. The district court is authorized to pay to the aforementioned schools from the Folding Carton Reserve Fund reasonable attorneys' fees attributable to their involvement in obtaining the grants now set aside by this court.

IT IS ORDERED AND ADJUDGED by this court that the additional disbursements made from the Folding Carton Reserve Fund to the plaintiff class claimants are affirmed.

IT IS ORDERED AND ADJUDGED by this court that this case be remanded to the district court and that, on remand, said district court is authorized to disburse the funds remaining in the Folding Carton Reserve Fund, after the payment of reasonable attorneys' fees as herein authorized, in accordance with the principles of the *cy pres* doctrine, although said district court shall not disburse any such funds to fund research in the area of antitrust law.

IT IS ORDERED AND ADJUDGED by this court that the district court determine whether any attorneys' fees or other fees were paid from the Folding Carton Reserve Fund for the purpose of establishing a foundation for the study of

antitrust law in violation of the law of this case established in the prior opinion of this court, and any fees that may have been distributed for such purpose shall be collected into the custody of the district court and returned to the Folding Carton Reserve Fund.

IT IS ORDERED AND ADJUDGED by this court that the district court shall allow reasonable attorneys' fees to the Committee related to the motion of the United States of America to intervene in this cause and the district court shall also allow reasonable fees for other matters not voided by this court, but no fees will be allowed for legal services on appeal related to the settlement agreement's attempt to avoid the prior order of this court and to establish research funds for antitrust and class action research.

IT IS ORDERED AND ADJUDGED by this court that no further distributions whatsoever be made to the plaintiff class, by settlement or otherwise, and no further late claimants whatsoever shall be recognized. The net balance in the Reserve Fund shall be used only for a *cy pres* purpose as determined by the district court.

IT IS ORDERED AND ADJUDGED by this court that the judgment of the district court that the amended complaint of Paul Houck be dismissed is hereby affirmed.

IT IS ORDERED AND ADJUDGED that the Folding Carton Administration Committee shall be entitled to reasonable attorneys' fees from the Folding Carton Reserve Fund for defending against Paul Houck's *qui tam* action.

IT IS ORDERED AND ADJUDGED that this court retains jurisdiction over this matter, and that the district court, upon compliance with the mandates set out in this Order, shall forthwith file a copy of its decision with the Clerk of this court. Said decision of the district court will be reviewed by the present panel of this court to determine conformity with the mandate of this court, and for consideration of any other issues which may arise.

IT IS ORDERED AND ADJUDGED by this court that Circuit Rule 36 shall apply to this cause.

IT IS ORDERED AND ADJUDGED by this court that the parties shall bear their respective costs.

APPENDIX B

[881 F.2d 494]

Paul HOUCK, on Behalf of the UNITED STATES of America, Plaintiff-Appellant,

v.

FOLDING CARTON ADMINISTRATION COMMITTEE, et al., Defendants-Appellees.

In re FOLDING CARTON ANTITRUST LITIGATION.

Appeal of UNITED STATES of America.

Nos. 88-1314, 88-2438.

United States Court of Appeals, Seventh Circuit.

Argued Nov. 8, 1988.

Reargued April 12, 1989.

Decided Aug. 9, 1989.

[495] Before WOOD, Jr., CUDAHY and KANNE, Circuit Judges.

HARLINGTON WOOD, Jr., Circuit Judge.

Two related cases, but cases with different issues, were consolidated for this appeal, and heard on November 8, 1988. Subsequently, two members of the original panel disqualified themselves and a new panel was constituted to rehear the arguments.

I.

IN RE:

FOLDING CARTON ANTITRUST LITIGATION

APPEAL OF:

UNITED STATES OF AMERICA.

A. MOTION TO CHANGE TITLE AND DESIGNATION

As a preliminary matter, we address a Motion to Change Title and Designation filed by the Folding Carton Administration Committee ("Administration Committee"). On November 10, 1988, after the original oral argument in this case, the Administration Committee filed a motion that included the following:

> [496] At the direction of the District Court, the members of the Administration Committee appointed by Judges Robson and Will to assist them in the processing of this complex antitrust case (MDL 250) and to represent them in this Court and in the United States Supreme Court respectfully move that the title of this case be changed to United States, Petitioner, v. Judge Hubert L. Will, Respondent, and the case be correctly designated as a mandamus proceeding by the United States against Judge Will, seeking an order from this Court commanding him to vacate the settlement agreement which Judge Robson and he approved on March 28, 1985 and to recover the funds distributed thereafter and pursuant thereto to some 2500 class members and two law schools.

No change, however, was made in the designation or title of this case while it remained in the district court. The United States responded, in effect, that the mandamus was at least one way this court could enforce its 1984 mandate. Arguably this matter could be regarded as a mandamus action. It had been requested that Judge Will be permitted an opportunity to respond if this matter is to be treated as one calling for a writ of mandamus. Even if this case now be labelled a mandamus, or left as it is, the basic issues remain the same. Those issues have been thoroughly briefed, and

fully argued twice. There is nothing further to be said on either side. Therefore, the motion is denied.

B. BACKGROUND SUMMARY

This appeal, the second, grows out of efforts to conclude the settlement of record-breaking civil antitrust litigation involving an alleged nationwide price-fixing conspiracy among manufacturers of folding cartons in violation of the Sherman Act (15 U.S.C. §§ 1-7).[1] Those efforts generated problems. The problem still remaining, although usually not considered a problem, arises because the original antitrust settlement of about $200,000,000 produced approximately $6,000,000 in excess of known claims and costs. This extra money was designated as the Reserve Fund. The Administration Committee was appointed to make fee recommendations and to assist in handling claims. Later the Administration Committee was used to explore solutions for disposition of the funds remaining in the Reserve Fund. The Reserve Fund was to be held for potential late claims and other contingencies in accordance with the district court's order of March 6, 1980. In 1982, after a few additional late claims and expenses had been paid, the Administration Committee recommended to the district court that the balance of the Reserve Fund, still approximately $6,000,000 because of favorable interest, be used to establish a private "Antitrust Development and Research Foundation" to promote the study of complex litigation and various substantive and procedural aspects of antitrust law. Various class members and defendants objected to this idea. The objecting motions were denied, and the first appeal to this court followed.

The opinion resulting from that first appeal, *In Re Folding Carton Antitrust Litigation*, 744 F.2d 1252 (7th Cir.1984) (*Folding Carton I*), precipitated the subsequent events. Judge Cummings, then the Chief Judge, wrote the majority opinion joined by Judge Eschbach, with Judge Flaum concurring in part and dissenting in part. It is necessary to see

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[1] The underlying litigation is fully described in the joint memorandum opinion of District Judges Robson, now deceased, and Will, reported at 557 F.Supp. 1091 (N.D.Ill.1983).

exactly what that opinion held in order to understand this subsequent appeal.

In *Folding Carton I* this court affirmed the district court's 1983 opinion holding that neither the plaintiff class nor the settling defendants had any further claim to the Reserve Fund. Further, this court affirmed that it was appropriate for the district court to consider use of *cy pres* doctrine to achieve an equitable disposition of the Reserve Fund. This court, however, made it clear, very clear, that it was inappropriate for the district court to utilize the Reserve Fund to establish the proposed "Antitrust Development and Research [497] Foundation." That proposal was described as "carrying coals to Newcastle." Numerous other organizations, governmental and nongovernmental, had already preempted the antitrust area for continuing research and study. Creation of the antitrust foundation was also found to be "a miscarriage of justice and an abuse of discretion." In lieu thereof this court "directed" that the remainder of the Reserve Fund escheat to the United States under 28 U.S.C. §§ 2041 and 2042.[2] Those sections were analyzed

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[2] 28 U.S.C. §§ 2041 and 2042 provide as follows:

§ 2041.

All moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the Treasurer of the United States or a designated depository, in the name and to the credit of such court.

This section shall not prevent the delivery of any such money to the rightful owners upon security, according to agreement of parties, under the direction of the court.

§ 2042.

No money deposited under section 2041 of this title shall be withdrawn except by order of court.

In every case in which the right to withdraw money deposited in court under section 2041 has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, such court shall cause such money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to any such money may, on petition to the court and

(footnote continued on next page)

and it was held that the statutory terms for federal escheat had been sufficiently satisfied, at least in "spirit." It was provided, however, that any entitled late claimant could still recover from the United States after the escheat.

Judge Flaum, concurring in part and dissenting in part, fully agreed that the unclaimed portion of the Reserve Fund should not be used to fund the proposed antitrust foundation, but he disagreed that the unclaimed fund could "escheat" to the United States as provided by the majority, 744 F.2d at 1256. In his view it was traditional for unclaimed property to escheat to the states, not the United States. 744 F.2d at 1258. A petition for rehearing was denied, but an additional order was entered supplementing the opinion and reaffirming the majority's direction that the balance of the Reserve Fund escheat to the United States under 28 U.S.C. §§ 2041 and 2042. 744 F.2d at 1260. The question of whether or not "title" to the Reserve Fund by reason of the escheat would vest in the United States was specifically noted as being left unresolved lest it be considered "advisory." It was held in the supplemental order, however, that escheat in this statutory context was not used in the same sense as escheat to the states. 744 F.2d at 1260. There was no remand. Judge Flaum joined in the denial of the petition for rehearing but did not subscribe to the reasoning of the supplemental order. This court showed no interest in the ensuing *en banc* petition and denied a motion to stay the issuance of its mandate.

Thereafter some parties, including the two district judges themselves, Judges Robson and Will, filed their own certiorari petitions in the Supreme Court as well as a petition for a writ of mandamus. The grounds stated for the issuance of the mandamus writ were that the action of the appellate court contravened the sound exercise of appellate jurisdiction when this court substituted its findings and discretion

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(footnote continued from preceding page)

upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him.

for that of the district court, and further, that the interpretation of the escheat was a serious error of law. That is where this new litigation chapter begins.

C. THE NEW SETTLEMENT

While those petitions were pending in the Supreme Court the parties began working out a settlement to dispose of the excess funds that was not in keeping with the mandate of this court. After providing for late claims, that settlement proposal provided that the funds remaining after the expiration of the deadline for late claims would be divided equally between (1) a pro rata distribution to all previously paid class members, and (2) two or more Chicago-area law schools for the purpose of funding [498] research projects involving enforcement of the antitrust laws, management of complex litigation, and assistance to needy students. The new settlement proposal provided for the solicitation and receipt of law school applications for a share of the funds.

Before that proposed settlement was constructed in final form, however, and recognizing that this court had given the Reserve Fund to the United States by statutory escheat, a directive unpopular with the district judge and the parties, the Administration Committee endeavored to determine the position of the United States Attorney's office in Chicago in regard to that interest. That office was contacted by telephone on December 17, 1984, by a member of the Committee and advised of the Committee's desire to discuss with the government some possible resolution of the litigation. This was followed the next day by a letter confirming the prior telephone conversation and enclosing copies of the opinions of this court and the district court. Later, in February 1985, the United States Attorney's office was again advised that a stipulated settlement was being discussed. Another telephone contact was made with the Chief of the Civil Division of the United States Attorney's office by another attorney for plaintiff class. That attorney forwarded to the United States Attorney's office a copy of the proposed stipulated settlement and gave notice that it would be presented to the court at a hearing set in March 1985. At that March hearing no

one appeared on behalf of the United States, and consequently the hearing was continued by Judge Will. Thereafter, a plaintiff class attorney met personally with the Chief of the United States Attorney's Civil Division. The proposed settlement was discussed. It was thereafter reported by the class attorney to Judge Will that the government had no objection to the settlement. It was further reported that no one would be sent to represent the government at the continued settlement hearing to be held the following day, and no one was.[3] On that day, March 18, 1985, the new proposed settlement was approved. Thereafter the pending petitions in the Supreme Court were voluntarily dismissed by stipulation. Judges Robson and Will withdrew their certiorari and mandamus petitions.

Some remaining late claims were filed and after payment of costs and expenses approximately $3.6 million dollars still remained in the Reserve Fund. In accordance with the settlement agreement one-half was distributed pro rata to about 2,700 class members who had already received what was originally considered to be full compensation. Six Chicago law schools submitted applications for the Reserve Fund grants. Upon review of the applications, assisted by the Administration Committee, the district court directed that a $1.2 million grant be made to Loyola University in Chicago to establish a Center for Antitrust Law in the Public Interest, and also, that a $156,000 grant be made to the University of Chicago for a study of the performance of juries in complex litigation, including antitrust cases. The grant to Loyola was paid and deposited in a special account, but implementation of both grants was stayed when a *qui tam* complaint was filed by Paul Houck under the False Claims Act, 31 U.S.C. § 3729. The government also declined to intervene and prosecute the *qui tam* case.[4]

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[3] These contacts with the United States Attorney's office are more fully set forth in *In Re Folding Carton Antitrust Litigation*, 687 F.Supp. 1223, 1226-27 (N.D.Ill.1988).

[4] The dismissal of that case by Judge Norgle for lack of subject matter jurisdiction, now also on appeal, is considered in a separate part of this opinion.

However, about two months later the government changed its mind and sought to intervene and to have the current settlement agreement vacated. This time it was not the United States Attorney's office but the Civil Division of the Department of Justice that became interested in the case. The basis of the motion to intervene was that the settlement was contrary to the law of the case as set forth in this court's prior opinion, that the government had not technically consented to the settlement offer, and that the motion to intervene was timely as the action was taken as soon as the [499] government found that actual distribution of the fund was being made.

Judge Will denied the government's motion. He found that the United States had received seven notices of the proposed settlement and that its agent, the United States Attorney's office, had represented that the government had no objection to the settlement. The district court then considered and weighed the possible prejudice to the existing parties and to the government. This included the difficulty of trying to recoup the extra amounts that had already been distributed to class members. Prejudice was found to weigh against the government's intervention. The district court also refused to vacate the settlement on the basis of the law of the case as represented by this court's opinion, because it was not final as appeals were pending. The district court also found that the Chief of the Civil Division in the United States Attorney's office had authority to act for the government and that the federal regulations limiting a United States Attorney's settlement authority were not applicable because the government's interest in the Reserve Fund was not a "money claim." The government now appeals.

D. DISCUSSION

The circumstances of this case call into question the power of this court and the enforcement of its judgments. Such a situation should not have arisen. We shall, however, not unnecessarily dwell on individual contributions to this situation. Our purpose is to resolve this case, taking it in the

condition in which it has come back to us. That is not to suggest that district courts and parties to litigation may regard the opinions of this court as merely advisory, as counsel for the Administration Committee imprudently suggested at the first oral argument. Later he had some second thoughts about the use of that terminology. If they do so regard the mandates of this court, they shall do so at their peril. This court, in appropriate circumstances, will see to the enforcement of its judgments by all means at its disposal. Some cases, however, may be appropriately settled by the parties on a different basis even after being resolved otherwise by this court. For instance, in a situation involving an ordinary money judgment in a damage suit the parties are presumably free to settle around the award made by this court. A post-appeal settlement might, for example, be motivated by a desire to avoid the risk, expense, and delay of a petition for rehearing, grant of certiorari, or a new trial. Even in that situation, however, the opinions of this court are not merely advisory. There is in the present case a distinction which can be made. Here it was not in the true or ordinary sense the prevailing parties who purported to give the balance of the fund away, but the Comm [sic] and the district court, neither of which had any rights to the money they distributed. In the present case it is also of special concern that there was a specific direction in the opinion of this court that a certain proposed use of the fund not be carried out, and in addition an interest was specifically created under the escheat statute in the United States. Those directives cannot, in ordinary circumstances, be avoided or ignored by either the district court or by the parties through a settlement or by some other circumventing device.

The United States Attorney's office for some reason neglected its responsibilities to look out for whatever interest the United States had been given by this court, and actually consented to a settlement which took away that interest. The actions of that office remain unexplained and are labelled "error" and "regrettable" by the Department of

Justice. In sharp contrast, the Civil Division of the Department of Justice responded in its customary competent and professional manner and has done all that could reasonably be done to support the judgment of this court. In the present circumstances, however, that effort comes too late.

The basic question is whether the way the matter was handled by the United States Attorney's office makes any difference under the applicable government regulations governing the authority of the United States Attorneys. There is also the possibility of an estoppel. As argued by [500] the government no [sic] representative of the United States actually appeared in the district court to agree to the stipulated settlement, nor did anyone from that office sign the settlement stipulation. Further, none of the parties consulted with or received either written or oral authorization from a representative of the United States who actually had authority to settle a matter involving a sum in the amount at issue here. The United States Attorney did not have that authority. It would have been a better procedure for the district court to have issued an order requiring the United States Attorney to appear before the court approved a settlement which was at odds with the directive of this court and implicated a government interest. The parties could also have petitioned this court for instructions regarding the purported rejection by the United States of whatever interest had been bestowed. We must, therefore, begin by examining the structure and impact of those regulations as well as the escheat statutes, 28 U.S.C. §§ 2041 and 2042.

At the time the settlement was approved there was an estimated seven million dollars potentially at stake, although it was subsequently determined to be about six million. Whatever the actual amount may have been, those ranges far exceeded the settlement authority given by 28 C.F.R. § 0.160(a)(2), not only to a United States Attorney, but even to the Assistant Attorney General for the Civil Division in the Department of Justice under whose authority this matter

falls. That limit is $750,000.[5] The Assistant Attorney General, pursuant to 28 C.F.R. § 0.168(a), may redelegate to the United States Attorney any or all of that settlement authority.[6] At the time of this settlement the Assistant Attorney General had delegated settlement authority to the United States Attorneys where the principal amount of the claim did not exceed $100,000, now increased to $200,000, but in any event well below the amount involved. It would have been well for the government regulations to have been considered in the district court, but they were not. *Brubaker v. United States*, 342 F.2d 655, 662 (7th Cir.1965).

It is not clear, however, that what was done was actually the acceptance of an offer in compromise of a claim on behalf of the United States to which the regulation would clearly apply. This court purported to create some not fully defined interest in the Reserve Fund and gave it to the United States under the statute. That interest, however, was rejected by the United States Attorney's office. It is questionable whether technically the claim involved was one for or against the United States. The applicability of that regulation in these circumstances is not without some ambiguity. In our view this issue largely depends on the nature of the interest this court purported to give or could give the United States under the escheat statute, an interest that we

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[5] 28 C.F.R. § 0.160(a)(2) provides that Assistant Attorneys General of the litigating divisions may:

> Accept offers in compromise of claims on behalf of the United States in all cases in which the difference between the gross amount of the original claim and the proposed settlement does not exceed $750,000 or 10 percent of the original claim, whichever is greater.

[6] 28 C.F.R. § 0.168(a) provides:

> The Assistant Attorneys General are authorized to redelegate to subordinate division officials and U.S. Attorneys any of the authority delegated by §§ 0.160, 0.162, 0.164, and 0.172, except that when a disagreement between a U.S. Attorney or other Department attorney and a client agency over the terms of a proposed settlement cannot be resolved below the Assistant Attorney General level, the settlement must be presented to the appropriate Assistant Attorney General for approval.

originally declined to define, 744 F.2d at 1260. That issue must now be faced.

In the district court the "escheat" ruling of this court, *Folding Carton I*, appears not to have been acceptable to anyone. Judge Will wrote that it was not a disposition that any of the parties had requested or desired, that it was done without a hearing or opportunity to object, and that it was causing some "confusion." *In Re Folding Carton Antitrust Litigation*, 687 F.Supp. 1223, 1225-26 (N.D.Ill.1988). Judge Will went further and described the opinion in [501] *Folding Carton I* as "silly." More constructive, since the opinion of this court was not on appeal in the district court, was Judge Will's consideration of the nature of the interest given by this court to the government. It was, he held, not a "true escheat." 687 F.Supp. at 1226. In that view he agreed with Judge Flaum in dissent, 744 F.2d at 1256, because as Judge Flaum explained, it could not be a true escheat and at the same time remain permanently available in the United States Treasury to pay late claimants. The majority in *Folding Carton I* also recognized that any claimant entitled to a share, even after escheat under the terms of the statute, would not be foreclosed. 744 F.2d at 1255. Only if no late claimant appeared could it as a practical matter possibly amount to a true escheat. The unclaimed five-year period provided by the statute before the escheat could take effect had almost run at the time of the opinion of this court, and has now. It would thus appear that Judge Will, the majority of the *Folding Carton I* panel of this court, and Judge Flaum all recognized that it was not a permanent transfer to the United States of unconditional title to the Reserve Fund. The United States under the statute was only a stakeholder, as unlikely as it was that there would be any more late claimants of consequence. The escheat statute merely provides a means of collecting into one place all unclaimed monies held in the registries of the many district courts, but still subject to payment to entitled claimants. That being so, it is doubtful that the settlement was actually of a claim on behalf of the United States in the usual sense, as the government had no unconditional right of ownership. If so the

government regulations would be inapplicable. In any event, considering all the circumstances this appears to be a proper place to invoke an estoppel against the United States, something we are ordinarly reluctant to do. Fed.R.Civ.P. 24(a)[7] provides for intervention of right and in this case it would be the United States which claims an interest in the property. This rule, however, is of no avail to the government as it may be seen on the face of the rule that the application must be timely, and it was not. Any arguably unusual circumstances that might excuse that delay are outweighed by the same factors considered in our estoppel consideration.

The lack of response of the United States Attorney's office was a major contribution to these difficulties, regardless of the indefensible aspects of the settlement which resulted from the efforts of the others involved. As a result an additional distribution was thereafter made to 2,700 individual claimants, and the law schools became involved.

The doctrine of equitable estoppel, as fully discussed by Judge Cudahy in *Portmann v. United States*, 674 F.2d 1155 (7th Cir.1982), has application here. Further, the United States Attorney is not just another government agency, but the legal representative of the government—the government's counsel. That office acted in such a manner as to prejudice, although in different ways, the parties, the government, and this court's original mandate. However, even apart from estoppel and the lack of a timely application to intervene under Fed.R.Civ.P. 24(a), it must also be remembered that it was this court as an original matter which invoked the escheat statute on behalf of the United

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[7] Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

States. The district court and the parties, nevertheless, lacked authority to rewrite this court's original opinion to suit themselves. In view of all the circumstances, this court holds that any interest the United States may have had under 28 U.S.C. § 2042 is extinguished for the reasons mentioned. The denial of the motion of the United [502] States to intervene is affirmed. The United States is therefore not a party.

This court in *Folding Carton I* originally affirmed the district court in holding that the plaintiff class had no further right to the Reserve Fund. There was no direct order in that opinion that there be no further distribution to claimants. In the course of settlement, however, it was agreed between the parties and approved by the district court that an additio' ' distribution be made to those claimants. That has been done. That additional distribution to class claimants in these particular circumstances is no longer a concern to this court in view of our holding that the United States has no remaining interest in the Reserve Fund, but it would be quite to the contrary if the interest given the government remained. The claimants were the victims of the conspiracy and, even if some of them are now overcompensated, their entitlement to an additional share of the Reserve Fund is not without foundation.

The status of the other one-half of the Reserve Fund is a different matter. This court in *Folding Carton I* explicitly held that while it was appropriate for the district court to consider the use of the *cy pres* doctrine, the creation of the proposed antitrust foundation was inappropriate, a miscarriage of justice, and an abuse of discretion. 744 F.2d at 1254-55. That was a part of the opinion that neither the parties nor the district court could avoid on their own initiative, but they tried. They attempted to do substantially the same prohibited thing by changing the form, but not the substance. The settlement agreement provided for payments from the Reserve Fund to two law schools "to fund research projects in the area of class actions, and particularly antitrust law," to quote from Judge Will's opinion, 687 F.Supp. at 1227.

Those two law schools, however, share not the least blame for this situation, but nevertheless the abuse of the trial court's discretion in violation of the mandate of this court cannot be permitted to stand. The grants from the Reserve Fund to Loyola University and the University of Chicago, not parties to this litigation, are voided and set aside. Any monies disbursed to one or both of those schools or set aside for disbursal shall on remand forthwith be collected into the custody of the district court. Those law schools, however, shall be entitled to reasonable attorneys' fees attributable to their involvement in the application process and subsequent related events which may be paid from the Reserve Fund.

Upon remand, the *cy pres* doctrine remains an appropriate solution for the exercise of sound discretion by the district court, but the *Folding Carton I* prohibition against using the funds for antitrust purposes remains and shall not be circumvented by the parties or the district court. The two law schools, Loyola and the University of Chicago, are in no way disqualified from being the beneficiaries of some new appropriate *cy pres* use, but the district court on remand shall have discretion totally independent of what has so far transpired. It may consider entirely different and appropriate uses under the *cy pres* doctrine. This settlement resulted from a nationwide case. Therefore, it may be appropriate for the district court on remand to consider to some degree a broader nationwide use of its *cy pres* discretion.[8] However,

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[8] The district court, for one possible example, may care to consider the newly created Federal Judicial Center Foundation, 28 U.S.C. § 629. The Foundation was recently created by Congress for the purpose of receiving and using gifts to further the goals of the Judicial Center. The Judicial Center is an independent government agency responsible for providing education and training services to all judicial personnel, as well as research and systems development services to the courts, the Judicial Conference of the United States, and to the Congress. The work of the Judicial Center is recognized as broadly beneficial to the bar as a whole. The Board of the Foundation is composed of three members, including the chairman, appointed by the Chief Justice of the United States, two members appointed by the President Pro Tempore of the Senate, and two members by the Speaker of the House of Representatives.

(footnote continued on next page)

whatever appropriate *cy pres* use may be determined [503] by the district court remains fully in the discretion of the district court regardless of the two prior aborted efforts.

It is also the order of this court that no further distribution whatsoever be made to the plaintiff class or the settling defendants, by settlement or otherwise, and no further late claimants whatsoever shall be recognized. There is nothing left in this case for the parties to settle or give away.

In *Folding Carton I* it was provided that fees not be allowed for the establishment of the Foundation, 744 F.2d 1256. We assume that fee direction was followed, but on remand the district court shall determine whether that direction was in fact followed. If not, those fees shall forthwith be retrieved and returned to the Reserve Fund.

So far as fees are concerned for the subsequent period prior to this appeal, no fees are likewise to be permitted for any legal work that related to the second effort to establish an antitrust use for the Reserve fund which is now voided. Fees, however, may be allowed for matters related to the motion of the United States to intervene, or to other matters not voided by this court. For this appeal the allowance of fees is likewise to be apportioned in some reasonable and fair fashion, on the same limiting and proscribed basis, so that no fees shall be allowed for any legal service on appeal related to the second effort to establish or defend the research projects for class actions and antitrust.

The denial of the petition by the United States to intervene is affirmed, and the case is remanded to the district court for such further proceedings as may be necessary in keeping with this opinion. Circuit Rule 36 shall apply. If

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(footnote continued from preceding page)

This use would come close to giving the United States back the same type of interest in the Reserve Fund that it would have held under *Folding Carton I*. Any gift to the Foundation must by statute be deposited in a separate fund in the Treasury of the United States awaiting its use by the Board.

the new district judge desires to appoint a new Administration Committee, retain the former Administration Committee, or proceed without any Administration Committee, that decision also shall be within the discretion of the district court.

When the district court comes to a conclusion on the remaining issues in this case, a copy of that decision shall forthwith be filed with the Clerk of this court. It will then be reviewed by this present panel for conformity with the mandate of this court, and on any other basis which may be raised by appropriate parties. To expedite that review, this court retains jurisdiction. Any related problems that arise on remand may be brought by petition to the attention of this court. The parties shall bear their respective costs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

II.

PAUL HOUCK's *QUI TAM* ACTION

Plaintiff-appellant, Paul Houck, on behalf of the United States of America ("Houck"), appeals the district court's decision to dismiss his amended complaint for lack of subject matter jurisdiction. For the reasons stated below, we affirm.

A. FACTUAL BACKGROUND

The underlying facts relevant to this litigation are set forth in the preceding Administration Committee portion of this opinion. The settlement agreement approved by the district court after *Folding Carton I* provided that the Reserve Fund was to be distributed to late claimants and to the Administration Committee for costs of administration and attorneys' fees. All remaining funds were to be divided equally with one-half to be distributed pro rata to class member claimants and one-half to be paid to two or more Chicago-area law schools. The funds were then fully distributed to the class member claimants and to one law school before this case was filed.

Houck assisted late claimants in filing claims and recovering money from the fund. Houck brought this *qui tam* action on behalf of the United States in 1987. He alleged that the Administration Committee and its members, as well as individuals and entities to whom money was distributed, knowingly disbursed the funds in contravention of the mandate of this court.

In his amended complaint, Houck alleges that the claims submitted pursuant to the settlement order constituted false claims [504] under the False Claims Act, 31 U.S.C. §§ 3729-3731, that the Committee members breached their fiduciary duties, that a constructive trust should be imposed, and that the settlement order constituted fraud upon the court under Rule 60(b) of the Federal Rules of Civil Procedure. The district court dismissed Houck's complaint based on a lack of subject matter jurisdiction and Houck appeals.

B. ANALYSIS

We review the district court's decision *de novo*, accepting as true all well-pleaded factual allegations and the reasonable inferences drawn from them. *Kush v. American States Ins. Co.*, 853 F.2d 1380, 1382 (7th Cir.1988).

The district court properly dismissed Houck's claim as a *qui tam* plaintiff under the False Claims Act ("the Act"). The purpose of the Act is to recover money taken from the government by fraud. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551, 63 S.Ct. 379, 387, 87 L.Ed. 443 (1943). The Act provides that under certain circumstances a "*qui tam*," or private citizen relator, may bring an action on behalf of the United States to recover funds for the treasury. 31 U.S.C. § 3730(b)(1). The Act was amended in 1986 and the amendments took effect October 27, 1986. False Claims Amendments Act of 1986, Pub.L. No. 99-562, 100 Stat. 3153 (1986); *see* S.Rep. No. 99-345, 99th Cong., 2d Sess. 35, *reprinted in* 1986 U.S. Code Cong. & Admin.News 5266, 5300.

The district court properly applied the post-amendment provisions of the Act in dismissing the complaint. The

Administration Committee argues that the pre-amendment version of the Act should apply as a jurisdictional bar to Houck's action. The Administration Committee contends that the Settlement Order entered on March 28, 1985 was the alleged false claim upon which Houck's complaint is based. However, Houck does not contend that the settlement order itself was a false claim, but alleges that the payment of claims constituted the false claims under the Act. The district court properly found that the claims were submitted for distribution after the amendments became effective and therefore the amended provisions are applicable. Because we find that the post-amendment version of the Act is applicable, we do not address the substantive argument of the Administration Committee with respect to the pre-amendment Act.

In dismissing Houck's complaint for lack of subject matter jurisdiction, the district court relied on section 3730(e)(4)(A) of the Act which provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). Under section 3730(e)(4)(A), a *qui tam* plaintiff may not bring an action based upon publicly disclosed allegations or transactions *unless* the plaintiff was an "original source" of the information. 31 U.S.C. § 3730(e)(4)(A). Prior to enactment, section 3730(e)(4)(A) contained a provision which permitted a *qui tam* plaintiff to bring an action based on publicly disclosed allegations and transactions if the government failed to act within six months of the disclosure. S.Rep. No. 99-345, 99th Cong., 2d Sess. 30, *reprinted in* 1986 U.S.Code Cong. & Admin.News 5266, 5295. However, the six-month provision was deleted from the final version of the bill. Therefore, the Act in its

present form does not allow a *qui tam* plaintiff to bring an action based solely on publicly disclosed transactions. The information upon which Houck based his complaint was publicly disclosed in *Folding Carton I*, 774 F.2d 1252 (7th Cir.1984). Therefore, this information cannot form the basis of an action unless Houck is an "original source."

An "original source" is defined in the Act as "an individual who has direct and independent knowledge of the information on [505] which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). The district court found that Houck's knowledge of the information upon which his claim was based was "direct" as a result of his involvement in assisting late claimants in recovering money out of the settlement order funds. However, Houck's knowledge of the information on which his claim is based is not "independent" within the statutory definition of "original source." There is no evidence to indicate Houck would have learned of the claims to the funds absent public disclosure. Under section 3730(e)(4)(B), an original source must have "direct *and* independent knowledge" of the information on which the complaint is based. 31 U.S.C. § 3730(e)(4)(B) (emphasis added). Therefore, under the Act the district court correctly concluded that it lacked subject matter jurisdiction because the information upon which Houck's claim is based was publicly disclosed and Houck was not an "original source" of the information.

Houck also seeks relief through an independent action under Rule 60(b) of the Federal Rules of Civil Procedure. The complaint alleges that the settlement order was procured through fraud upon the court based on certain representations made by an attorney for the Administration Committee. The district court concluded Houck lacked standing to maintain an independent action under Rule 60(b) because his relationship to the multi-district litigation was tenuous at best. Houck did not allege any injury to himself personally. In addition, he may not proceed on

behalf of the United States as a *qui tam* plaintiff and therefore he lacks standing in a representative capacity.

The cases relied upon by Houck in asserting that his lack of standing is immaterial are not germane to his argument because they involve movants whose legal interests were affected by the judgment sought to be set aside. *See Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514, 525 (3d Cir.1948) (quoting *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580, 66 S.Ct. 1176, 1179, 90 L.Ed. 1447 (1946)) (intervention to set aside judgment for fraud warranted as to those affected by outcome), *cert. denied sub nom. Universal Oil Products Co. v. William Whitman Co.*, 335 U.S. 912, 69 S.Ct. 481, 93 L.Ed. 444 (1949); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 239, 64 S.Ct. 997, 998, 88 L.Ed. 1250 (1944) (movant seeking to set aside allegedly fraudulent judgment was party to prior litigation in which the judgment was entered), *overruled on other grounds, Standard Oil Co. v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976); *Martinà Theatre Corp. v. Schine Chain Theatres, Inc.*, 278 F.2d 798 (2d Cir.1960) (movant had been plaintiff in previous action against same defendant in which a stipulated settlement had been reached); *Southerland v. Irons*, 628 F.2d 978, 979 (6th Cir.1980) (social services department alleged fraud upon the court in independent action based on attorney's representation that department's lien would be paid out of settlement proceeds and subsequently was not paid).

A nonparty who seeks to attack a fraudulently obtained judgment through an independent action is required to show that his legal interests are affected. 7 *Moore's Federal Practice* ¶ 60.36 (2d ed. 1987). In *Kem Mfg. Corp. v. Wilder*, 817 F.2d 1517, 1521 (11th Cir.1987), the Eleventh Circuit held that a nonparty must have standing under Rule 60(b) even if fraud upon the court is the basis of the motion. Although Houck was involved in assisting late claimants, he does not bring this action on his own behalf but on behalf of the

United States. We therefore affirm the district court's decision that Houck lacked standing to bring an independent action under Rule 60(b).

The two remaining claims advanced by Houck allege breach of fiduciary duty and imposition of a constructive trust. The district court properly dismissed those claims based on lack of subject matter jurisdiction. State law claims will not be adjudicated in federal court under the doctrine of pendent jurisdiction without a compelling reason, generally when the federal [506] claim presents a triable issue. *Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc.*, 781 F.2d 604 (7th Cir.1986). Because of the lack of jurisdiction over Houck's proposed federal claims, the district court properly relinquished jurisdiction of the state law claims.[9]

We have held in the first part of this opinion that no interest in the Reserve Fund remains in the United States. There is therefore no action which can be taken on behalf of the United States. The Administration Committee shall be entitled to reasonable attorneys' fees from the Reserve Fund for the defense of this case. The parties shall bear their own costs.

We have affirmed that the United States was properly denied the right to intervene as a party, and that the claim of the *qui tam* plaintiff was properly dismissed for lack of jurisdiction. From that point the mandate of this court shall be carried out as set forth in this opinion. *Cascade Nat. Gas v. El Paso Nat. Gas*, 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967).

AFFIRMED.

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[9] Because we lack subject matter jurisdiction we do not address the issue of immunity of the Administration Committee raised by appellees. The district court's denial of appellees' motion for attorneys' fees under the Act was not raised on appeal and therefore we do not address that issue.

APPENDIX C

JUDGMENT—ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
August 9, 1989

Before

HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. RICHARD D. CUDAHY, *Circuit Judge*
HON. MICHAEL S. KANNE, *Circuit Judge*

No. 88-1314

PAUL HOUCK, on behalf of the United States of America, *Plaintiff-Appellant,* vs. FOLDING CARTON ADMINISTRATION COMMITTEE, et al., *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 87 C 1253 Charles R. Norgle, *Judge*

No. 88-2438

IN RE: FOLDING CARTON ANTITRUST LITIGATION APPEAL OF: UNITED STATES OF AMERICA	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. MDL 250 Hubert L. Will, *Judge*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date. The parties shall bear their own costs.

APPENDIX D

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
September 11, 1989

Before
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. RICHARD D. CUDAHY, *Circuit Judge*
HON. MICHAEL S. KANNE, *Circuit Judge*

No. 88-1314

PAUL HOUCK, on behalf of the United States of America, *Plaintiff-Appellant,* vs. FOLDING CARTON ADMINISTRATION COMMITTEE, et al., *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 87 C 1253 Charles R. Norgle, *Judge*

No. 88-2438

IN RE: FOLDING CARTON ANTITRUST LITIGATION APPEAL OF: UNITED STATES OF AMERICA	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. MDL 250 Hubert L. Will, *Judge*

IT IS ORDERED that the judgment entered on August 9, 1989, in these two appeals is hereby VACATED.

APPENDIX E

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
September 15, 1989

Before
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. RICHARD D. CUDAHY, *Circuit Judge*
HON. MICHAEL S. KANNE, *Circuit Judge*

No. 88-1314

PAUL HOUCK, on behalf of the United States of America, *Plaintiff-Appellant,* vs. FOLDING CARTON ADMINISTRATION COMMITTEE, et al., *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 87 C 1253 Charles R. Norgle, *Judge*

No. 88-2438

IN RE: FOLDING CARTON ANTITRUST LITIGATION APPEAL OF: UNITED STATES OF AMERICA	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. MDL 250 Hubert L. Will, *Judge*

ORDER

On consideration of the Petition for Correction of Opinion, Rehearing and Suggestion for Rehearing *In Banc*, filed

in the above-entitled cause on August 23, 1989, by Hubert L. Will, Senior United States District Judge, the Class Plaintiffs' Petition for Rehearing with Suggestion for Rehearing In Banc filed on August 23, 1989, and the Petition of Paul Houck, on behalf of the United States of America, plaintiff-appellant, filed on September 12, 1989, no judge in active service* desires a vote thereon, and all judges on the original panel have voted to deny the aforesaid petitions. Accordingly,

IT IS ORDERED that the aforesaid petitions be, and the same are hereby, DENIED.

It is further ordered, however, that the opinion be amended as follows:

Page 8, paragraph 2, line 3, delete "This time it was not the United States Attorney's office but the Civil Division of the Department of Justice that became interested in this case." Replace with "At this later stage of these proceedings the United States Attorney's office joined with the Civil Division of the Department of Justice in the motion to intervene."

Page 10, first complete paragraph, line 9, delete "and has," and in lieu thereof between the words "manner" and "done" insert "and now joined by the United States Attorney's office have."

Page 24, line 4 following "(1967)." add footnote reference "10".

Page 24, at bottom of page add the following footnote:

[10] See also: *United States v. E. I. DuPont de Nemours and Co.*, 366 U.S. 316, 325 (1961); *Continental Ins. Co. v. United States*, 259 U.S. 156, 165-66 (1922).

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* All other active judges except Judge Daniel A. Manion disqualified themselves from consideration of the aforesaid petitions.

APPENDIX F

Opinion by Judge Cummings
Judge Flaum concurring in part,
dissenting in part

JUDGMENT ORDER

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
September 5, 1984

Before
HON. WALTER J. CUMMINGS, *Chief Judge*
HON. JESSE E. ESCHBACH, *Circuit Judge*
HON. JOEL M. FLAUM, *Circuit Judge*

Nos. 83-1467, 83-1468,
83-1506, 83-1507 and
83-1673
In re:
FOLDING CARTON
ANTITRUST LITIGATION

Appeals of:
FEDERAL PAPER BOARD
COMPANY, INC.;
CUMBERLAND FARM
DAIRIES; PANTRY PRIDE
ENTERPRISES, INC.; THE
MEAD CORPORATION;
BEATRICE FOODS CO.;
LAND O'LAKES, INC.; G.
HEILEMAN BREWING
CO., INC., AND GRIST
MILL CO.

Appeals from the
United States District
Court for the
Northern District of
Illinois, Eastern
Division.
MDL 250

Edwin A. Robson and
Hubert L. Will,
Judges

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the order of February 17, 1983, and the order of March 3, 1983, approving fees and costs are AFFIRMED except with respect to the establishment of the Foundation. As to the reserve fund, any portion (including interest) remaining a year herefrom after the payment of meritorious claims and expenses by the Administration Committee shall escheat to the United States subject to the conditions expressed in 28 U.S.C. §§ 2041 and 2042. The motion to dismiss appeals is denied. Costs on appeal are to be borne by the respective parties. All the above is in accordance with the opinion of this Court filed this date.

APPENDIX G
[744 F.2d 1252]

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Nos. 83-1467, 83-1468, 83-1506, 83-1507 and 83-1673

IN RE:

FOLDING CARTON ANTITRUST LITIGATION

APPEALS OF:

FEDERAL PAPER BOARD COMPANY, INC.; CUMBERLAND FARM DAIRIES; PANTRY PRIDE ENTERPRISES, INC.; THE MEAD CORPORATION; BEATRICE FOODS CO.; LAND O' LAKES, INC.; G. HEILEMAN BREWING CO., INC., AND GRIST MILL CO.

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division.
MDL 250—Edwin A. Robson and Hubert L. Will, *Judges.*

ARGUED JANUARY 13, 1984—DECIDED SEPTEMBER 5, 1984

[1253] Before CUMMINGS, *Chief Judge,* ESCHBACH and FLAUM, *Circuit Judges.*

CUMMINGS, *Chief Judge.* These five appeals have been consolidated and grow out of antitrust litigation involving an alleged nationwide price-fixing conspiracy among manufacturers of folding cartons in violation of the Sherman Act (15 U.S.C. § 1). The appeals have been filed by two former defendants and six former class-member plaintiffs and relate chiefly to the district court's disposition of an approximately $6,000,000 reserve fund established to pay late claims and to meet various expenses and contingencies connected with the

distribution of the $200,000,000 settlement fund. The litigation is fully described in the joint memorandum opinion of District Judges Robson and Will reported in 557 F. Supp. 1091 (N.D. Ill. Feb. 17, 1983).

On September 19, 1979, the district court entered a final judgment approving the settlement agreement providing for payment by the 25 defendants of $200,000,000 into a fund for distribution to the plaintiff class. Six days thereafter the court appointed the Folding Carton Administration Committee ("Administration Committee") which is also involved in these appeals. The settlement agreement provided for a cut-off date of September 6, 1979, for claims but later claims were honored with judicial assent.

On March 6, 1980, the district court approved distribution of 97% of the fund, which by then had grown to approximately $206,000,000, and decided that the balance be held in reserve for potential late claims and errors in distribution. All timely claims were paid by the Administration Committee by the end of April 1980. Some late claims were subsequently paid with court approval. Others still pend.

On September 3, 1982, the Administration Committee (composed of two counsel for the plaintiff class, one who had represented a defendant, and an independent fourth) recommended that the $6,000,000 in the reserve fund plus future interest be used to establish a private "Antitrust Development and Research Foundation" to promote the study of complex litigation and various substantive and procedural aspects of antitrust law. Thereafter six former [1254] plaintiff class members[1] and two former defendants[2] filed motions in the district court, which had retained jurisdiction of the case, seeking distribution of the remainder of the settlement fund to plaintiff class members or otherwise *pro rata* to the

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[1] Land O'Lakes, Inc., G. Heileman Brewing Co., Inc., Grist Mill Co., Beatrice Foods Co., Cumberland Farm Dairies, Inc. and Pantry Pride Enterprises, Inc.

[2] The Mead Corporation and Federal Paper Board Company, Inc.

settling defendants. Two of the class members[3] also requested return to class-member plaintiffs of fees and costs that had been awarded to counsel for the Administration Committee, or in the alternative that they be audited, with excessive fees and costs returned to them, and that the expenses paid to the Administration Committee's accounting firm be subjected to an independent accounting. We granted a temporary stay in April 1983 and granted a stay pending appeal on May 3, 1983, so that no more late claims have been paid[4] nor has the suggested Foundation been organized. At the same time we postponed any action on the Administration Committee's motion to dismiss the appeals.

We now hold that we have jurisdiction over this matter pursuant to the collateral order doctrine for the reasons given in *In Re General Motors Corporation Engine Interchange Litigation*, 594 F.2d 1106, 1117-1121 (7th Cir. 1979). Therefore the motion to dismiss is denied.

As to the district court's February 17, 1983, distinguished opinion, we agree that neither the plaintiff class nor the settling defendants have any right to the reserve fund. We also agree that under these circumstances, it was appropriate for the district court to consider the *cy pres* doctrine or Fluid Class Recovery to achieve an equitable disposition of the reserve fund. We discussed the "fluid recovery" concept in *Simer v. Rios*, 661 F.2d 655, 675-677 (1981), but refused to utilize it. As in *Simer*, the $200,000,000 paid by these defendants surely counsels deterrence, has disgorged illegally obtained profits and has satisfied the compensatory factor of the Sherman Act, so that fluid recovery is not needed.[5]

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[3] Cumberland Farm Dairies, Inc. and Pantry Pride Enterprises, Inc.

[4] The last distribution to late claimants was apparently on May 27, 1982.

[5] For a comprehensive discussion of this subject, see Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1516-1536 (1976); for refusal to utilize the analogous concept of creative sentencing in the criminal field, see *United States v. Wright Contracting Co.*, 728 F.2d 648, 650-653 (4th Cir. 1984), where the court of appeals overturned district court orders requiring defendants to contribute substantial sums to private charitable organizations.

Consequently it was inappropriate for the district court to utilize the reserve fund to establish a tax-exempt Foundation for research on complex antitrust litigation and on various substantive aspects of the antitrust laws, as suggested by the Administration Committee.

The district court directed that the funding of the Foundation should not commence until February 17, 1984, one year from the date of its opinion. That period was provided to the Administration Committee for the payment of additional late claims. 557 F. Supp. at 1110. Because of our temporary stay order of February 17, 1983, and our May 3, 1983, stay pending appeal, that beneficial one-year extension was of no effect. Therefore, the Administration Committee should hold the reserve fund available for one year from the date of this opinion to cover the cost of locating absent class members and making appropriate payments to them from the principal and accrued interest of the reserve fund.

After careful consideration, we conclude that the establishment of the proposed Foundation would be carrying coals to Newcastle. There has already been voluminous research with respect to multidistrict antitrust litigation and the substantive and procedural aspects of the antitrust [1255] laws by judges, lawyer specialists, law schools, bar associations, Congressional committees, the Department of Justice and the Federal Trade Commission, and it is a continuing project of all those concerned. In our view, establishing an unneeded Foundation for these purposes from the reserve fund would be a miscarriage of justice and an abuse of discretion. Instead, after the passage of a year hence for making appropriate payments to absent or tardy class members and for absorbing appropriate expenses, we direct that the remainder of the reserve fund escheat to the United States. The reason given by the district court for not ordering escheat to the United States government was that the federal statutory terms established in 28 U.S.C. §§ 2041 and 2042 for escheat do not apply. However, the spirit of those statutes is certainly satisfied and indeed the technical Congressional requirements present no real obstacles.

Thus 28 U.S.C. § 2041 is now entitled "Deposit of monies in pending or adjudicated cases," and the text applies to "All monies paid into any court of the United States or received by the officers thereof, in any case pending or adjudicated in such court * * *." Here the $200,000,000 fund was paid into the district court or its officers, namely, the Administration Committee, thus satisfying that portion of the escheat statute. The immediately succeeding Section initially refers to "money deposited under section 2041" and provides that money so deposited and unclaimed for five years shall be deposited in the federal Treasury "in the name and to the credit of the United States." The district court stated that it could not approve escheat to the United States because five years had not then elapsed since the deposit of the fund and the right to the money had not been adjudicated. 557 F. Supp. at 1103. But almost five years have now elapsed, and we are permitting unpaid class members to claim until a year from this opinion, which will be well beyond the unclaimed five years specified in Section 2042. Moreover, the right to the money among the parties hereto was adjudicated in the February 17, 1983, district court opinion and in 1979 when it approved the settlement agreement. In view of the generous time period afforded by the district court and us, it is doubtful that any claimants will come along thereafter. Nevertheless, the open-ended closing sentence of 28 U.S.C. § 2042 will allow "Any claimant entitled" thereto to recover from the United States after the escheat. *Hodgson v. Wheaton Class Co.*, 446 F.2d 527 (3d Cir. 1971). Accordingly, the statutory terms for federal escheat have been sufficiently satisfied.

As noted, 28 U.S.C. § 2042 permits an entitled claimant to recover from the United States. To that extent, the escheat is impermanent[6] and also raises no unconstitutional taking. Since any legitimate claimant has been afforded an adequate remedy against the United States, there is no bar to interim governmental use of the escheated money "deposited in the

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[6] Some of the cases cited in the dissent are thus accurate in stating that the escheat to the United States is not permanent.

Treasury and to the credit of the United States."[7] Because the settlement stemmed from defendants' alleged violations of Section 1 of the Sherman Act (15 U.S.C. § 1), it is much more appropriate to have the escheat benefit the United States rather than to adopt the labyrinthine methodology employed by the dissent to justify escheat to the states.

[1256] Five *amici curiae* non-claimant members of plaintiff class[8] favor the district court's order of February 17, 1983, insofar as it gives such persons an additional year to present claims. Our resolution grants a similar grace period but of course provides for escheat thereafter instead of for the Foundation championed by *amici*.

The order of February 17, 1983, and the order of March 3, 1983, approving fees and costs are affirmed except with respect to the establishment of the Foundation. As to the reserve fund, we hold that any portion (including interest) remaining a year herefrom after the payment of meritorious claims and expenses by the Administration Committee shall escheat to the United States subject to the conditions expressed in 28 U.S.C. §§ 2041 and 2042. Motion to dismiss appeals denied; costs to be borne by the respective parties.[9]

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[7] The Supreme Court decision addressing state escheat cited by the dissent, *Texas v. New Jersey*, 379 U.S. 674, did not involve property in dispute under federal law and therefore the role of the United States as a depositary under 28 U.S.C. § 2042 was not implicated. That case does not inject state *parens patriae* principles into matters solely within federal jurisdiction. Here the fund arose out of defendants' alleged violations of the federal antitrust laws. None of the cases relied upon in the dissent involves a situation comparable to the present one, so that this opinion is not in conflict with other cases involving 28 U.S.C. §§ 2041 and 2042.

[8] Avery International Corp., Handschy Chemicals, Inc., John C. Gilmore, Textor Corporation and Zachary Confections, Inc.

[9] All arguments presented by the litigants have been fully considered. Most of them were properly rejected in the opinion below. Those not covered there or in this opinion do not merit discussion.

FLAUM, *Circuit Judge*, concurring in part and dissenting in part. I agree that the district court abused its discretion in holding that the unclaimed portion of the settlement fund would be used to create an Antitrust Research Foundation. To the extent that the majority opinion holds that the unclaimed fund shall "escheat" and, in effect, remain permanently available in the United States Treasury to pay late claims pursuant to 28 U.S.C. § 2042, I dissent. The federal government cannot escheat unclaimed property.[1] The majority avoids this by saying that the federal government may have "interim" use of the funds until claimants present themselves, while recognizing that the claimants will never present themselves. As a practical matter, the majority is allowing an escheat, and indeed, the majority refers to its result as an escheat.

I agree that nonclaiming class members should be allowed an additional year in which to file claims. During that year, any late claimants who can show good cause may, in the discretion of the district court, be paid their share of the settlement fund. After the cut-off date, any remaining funds should be deposited with the United States Treasury. I would hold that at that time, any state that can establish a right to escheat under its law may petition to escheat its share of the fund.

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[1] It may be that the United States may forfeit funds deposited into the Treasury under section 2042 where a statute gives the government a right to assert a beneficial interest or ownership of the funds. *See United States v. Iovenelli*, 403 F.2d 468 (7th Cir. 1968) (government may have right to money used to bribe federal agent, pursuant to 18 U.S.C. § 3612); *In re Escheat of Monies Deposited*, 187 F.2d 131 (3d Cir. 1951) (same). *See also United States v. Farrell*, 606 F.2d 1341, 1344-45 and n.7 (D.C. Cir. 1979) (summary of statutory forfeiture). The United States may also assert a reversionary interest in unclaimed funds where such reversion is permitted by statute. *See* 38 U.S.C. § 3202(e) (any funds of deceased veteran derived from federal veterans' benefits paid to decedent that would escheat to state shall escheat to United States). One court has noted that although § 3202(e) uses the term "escheat," the statute actually permits reversion, not escheat. *In re Estate of Novotny*, 446 F. Supp. 1027, 1031-35 (S.D.N.Y. 1978). Here, there is no statute allowing the federal government to assert a beneficial interest in damages in a private antitrust action.

A.

Where a district court's order is a product of a choice among a number of options and reflects a weighing of the equities, and an appellate court holds that the district court abused its discretion in making the particular choice that it made, the appropriate course is for the appellate court to remand the case. *See, e.g., Ketchum v. Byrne*, No. 83-2044, slip op. at 27-28 (7th Cir. Aug. 14, 1984) (as amended). Here, the district court was faced with a number of possible choices, and after weighing the equities, held that the fund should be used to establish an antitrust foundation. The majority and I agree that this use was an abuse of discretion. I join in the majority's decision [1257] not to remand this case to allow the district court to dispose of the funds only because, in reaching its result, the district court clearly held that nonclaiming class members had the superior equitable right to the funds. *In re Folding Carton Antitrust Litigation*, 557 F. Supp. 1091, 1107 (N.D. Ill. 1983). The district court thus chose among its options. I do not hold, and I do not understand the majority to hold, that this holding was an abuse of discretion. Thus, I do not preclude, and I do not understand the majority to preclude, a district court in another case from dividing unclaimed funds among claiming class members or allowing the funds to revert to the defendants.

B.

Section 2042 provides in pertinent part:

> In every case in which the right to withdraw money deposited in court . . . has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, such court shall cause such money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him.

The majority holds that under section 2042, the money will "escheat" to the United States and remain available to pay late claimants who file. The majority notes that, as a practical matter, the class members who have not yet filed claims probably will never file. Thus, the question becomes what should happen to the money.

The United States government cannot obtain title to the money. Section 2042 operates only to change the depositary of unclaimed funds; it is not a federal escheat statute. 7 Pt. 2 Moore's Federal Practice ¶ 67.04 (1984). It does not operate to change the ownership of the funds; even though the money is deposited "in the name and to the credit of" the United States, the United States obtains no beneficial interest in the funds but merely holds the money as trustee for the rightful owners. *See United States v. Klein*, 303 U.S. 276, 279-80 (1938); *Stapleton v. $2,438,110*, 454 F.2d 1210, 1214-15 (3d Cir.), *cert. denied*, 409 U.S. 894 (1972); *In re Moneys Deposited*, 243 F.2d 443, 445 (3d Cir. 1957); *United States v. Cochrane*, 87 F.2d 3, 4 (5th Cir. 1936). Thus, there can be no permanent escheat to the United States. *Hodgson v. Wheaton Glass Co.*, 446 F.2d 527, 535 (3d Cir. 1971); *United States v. Seventeen Thousand, Four Hundred Dollars in Currency*, 524 F.2d 1105, 1109 (10th Cir. 1975) (Doyle, J., dissenting) (deposit under section 2042 does not act as escheat); *United States v. Iovenelli*, 403 F.2d 468, 469 (7th Cir. 1968); *see Hansen v. United States*, 340 F.2d 142 (8th Cir. 1965). Moreover, allowing the United States to take title to the money may well be unconstitutional as depriving claimants of property without due process of law. *See American Loan & Trust Co. v. Grand Rivers Co.*, 159 F. 775 (C.C. Ky. 1908).[2] Thus, the unclaimed funds at issue here do not, and cannot, become the property of the United States. The

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[2] Prior to the decision in *American Loan & Trust Co.*, the statute did not permit claimants to petition for return of their money. Following the decision, the statute was amended to its present form. *See* Act of March 3, 1911, c. 224, 96 Stat. 1083. Thus, the issue of the constitutionality of a permanent escheat to the United States has not arisen since the 1911 amendment. *See In re Moneys Deposited*, 243 F.2d 443 (3d Cir. 1957).

remaining funds merely will sit in the United States Treasury. It may be, as the majority states, that an escheat to the federal government would be "appropriate." Regardless of whether such a result is appropriate, it is not authorized by law.

Because some nonclaiming class members will never come forward, and because [1258] they have the superior equitable right to the funds, the task becomes to compensate them as nearly as possible.[3] Nonclaiming class members "are at least the equitable owners of their respective shares in the recovery." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 482 (1980).

Traditionally, unclaimed property escheats to the states. *See Hodgson v. Wheaton Glass Co.*, 446 F.2d at 535. A number of courts have recognized that money deposited under section 2042 may escheat to the states. *See id.; see also United States v. Klein*, 303 U.S. 536 (1938); *Stapleton v. $2,438,100*, 454 F.2d at 1214. This is true even where, as here, the unclaimed property is created under federal law. *See Hodgson v. Wheaton Glass Co.*, 446 F.2d at 535; *In re Moneys Deposited*, 243 F.2d at 418. I would not preclude the states here from petitioning to escheat the fund. Unlike the federal government, a state government may escheat unclaimed property on behalf of its citizens because the state stands as *parens patriae* as to its citizens.[4] *See* Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. 448, 453-58 (1972). The state acts to represent those of its citizens who do not collect their unclaimed property.

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[3] This is the purpose behind both the fluid recovery and *cy pres* theories. *See* Newberg, Class Actions § 7570 (1977).

[4] The theory of the state as *parens patriae* is used in the antitrust class action context in three distinct senses. First, it refers to the traditional power of the state to protect those of its citizens who cannot protect themselves, by collecting their unclaimed property. Second, it refers to attempts by states to extend their traditional power and sue on behalf of their citizens allegedly injured. Third, it refers to attempts by states to sue for alleged injury to the general economy of the state itself. In this case, I refer to *parens patriae* only in its first sense.

The theory of allowing an escheat to the states is that nonclaiming class members will benefit indirectly to the extent that the state uses the fund to benefit all of its citizens. Obviously, this results in an imperfect fit between the class harmed—the nonclaiming class members—and the class benefitted—all citizens. However, awarding the fund to either the defendants or the claiming class members results in an even less perfect fit because it ensures that nonclaiming members will receive no benefit.

Allowing escheat to the states serves the purpose of the antitrust law, class action settlements, and the purpose of the reserve fund at issue here. First, to the extent that antitrust law serves a deterrence purpose, it is served through any plan not resulting in return of the fund to the defendants. This purpose is not as applicable where, as here, the damages are created pursuant to a settlement agreement in which the defendant admits to no wrongdoing. To the extent that the antitrust law has a compensatory rationale, escheat serves it by allowing each member of the class some degree of recovery, even if indirect. Second, this court has noted that "[t]he class action . . . is primarily a device to vindicate the rights of individual class members." *In re General Motors Corporation Engine Interchange Litigation*, 594 F.2d 1106, 1128 n.33 (7th Cir. 1979), *cert. denied*, 444 U.S. 870 (1980). Escheat allows the rights of every class member to be vindicated in some sense. Finally, the district court stated that "the reserve fund itself was established for the express purpose of benefitting those class members who might appear and file late claims." *In re Folding Carton Antitrust Litigation*, 557 F. Supp. at 1107. Again, escheat is the best way to ensuring that the reserve fund will be put to an approximation of its intended use. *See generally* Comment, *Damage Distributions, supra* at 453-58.

In this case, the non-claiming class members are citizens of different states. Thus, under a *parens patriae* theory, no one state may escheat the entire fund. I would hold that each state may escheat a portion [1259] according to the rule announced in *Texas v. New Jersey*, 379 U.S. 674 (1965). In that case, several states invoked the original jurisdiction of

the Supreme Court to determine which state was entitled to escheat money belonging to creditors, living in different states, of a corporation. The Court held that the state of each creditor's last-known address should be entitled to escheat the creditor's share. To the extent that a creditor's last-known address is in a state that does not provide for escheat of that property, the state of corporate domicile would be permitted to escheat that portion, subject to the right of the state of the last known address to recover if its law later permitted escheat. *Id.* at 680-82. The Court based its result not on "statutory or constitutional provisions or ... past decisions nor ... logic ... [but rather] ease of administration and of equity.... We believe that the rule we adopt is the fairest, is easy to apply, and in the long run will be the most generally acceptable to all the States." *Id.* at 683.

Applying the rule to the facts of this case, and guided by the principles of "ease of administration and of equity" behind the rule, I would allow each state to escheat that portion of the fund that represents its share of the number of nonclaiming class members whose last address is within its state as compared to the total number of nonfiling claimants. A list of all such addresses was compiled when the notices of the settlement were sent out to all class members. To the extent that a state's law does not permit escheat of the property, the money will remain in the Treasury, subject to escheat should the state change its law.[5]

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[5] Some states have a provision in their escheat statute permitting the owner of the property to reclaim the property after escheat. *See* Uniform Disposition of Unclaimed Property Act § 19; *see, e.g.*, Ill. Rev. Stat. ch. 141, § 119.

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable HUBERT L. WILL

Cause No.: MDL 250 Date: FEBRUARY 17, 1983

Title of Cause: IN RE FOLDING CARTON:

Brief Statement of Motion: MEMORANDUM OPINION

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (seperate [sic] lists may be appended).

Names and Addresses of moving counsel: _____

_____

Representing: _____

_____

Names and Addresses of other counsel entitled to notice and names of parties they represent: _____

_____

ENTER MEMORANDUM OPINION. All motions of former class members whose claims have been paid as well as those of defendants requesting distribution of the reserve fund to them are denied. The Folding Carton Administration Committee is ordered to distribute any interest accruing on the excess reserve fund after the date of this opinion to the Antitrust Development Research Foundation to be established in accordance with this opinion. The Administration Committee which has so ably handled the fee applications, the investment of the settlement fund, the processing of claims and the distribution of the fund, is to retain the principal of the fund for a period of one year during which

time the Committee will take all possible steps locate [sic] former class members who have not previously filed claims and to assist them in filing proper claims against the fund. One year from the date hereof, the Administrative Orders awarding fees and expenses incurred in connection with the administration of the settlement fund is likewise denied and the subpoenas duces tecum associated with that motion are quashed. DRAFT. (SEE DRAFT FOR FULL PARTICULARS.) MEMORANDUM OPINION FILED.

Will, *J.* Docketed Feb. 18, 1983

APPENDIX I

[557 F. Supp. 1091]

In re FOLDING CARTON ANTITRUST LITIGATION.

No. MDL 250.

United States District Court,
N.D. Illinois, E.D.

Feb. 17, 1983.

[1093] Before ROBSON and WILL, District Judges.

MEMORANDUM OPINION

The folding carton antitrust litigation involved an alleged conspiracy on the part of the various defendants, all manufacturers of folding cartons, to fix prices in violation of the Sherman Act. Among the civil cases consolidated in this district for pretrial proceedings, *see* 28 U.S.C. § 1407, were several nationwide class actions on behalf of a certified class of direct purchasers of various [1094] types of folding cartons. On September 19, 1979, prior to trial, the class actions settled. The settlement was the result of a so-called "global agreement" under which all defendants contributed a total amount of roughly $200,000,000 to a settlement fund for ultimate distribution in accordance with an agreed-upon "plan of distribution."

In our order approving the settlement—on the basis of our finding that it was fair, reasonable and adequate—we retained jurisdiction "for all purposes related to the administration and distribution of the settlement funds." *See* Pretrial Order No. 60. Although the cases have long been closed, the matter is before us again pursuant to that retained jurisdiction. Several motions have been filed by a few former class members whose claims were paid relating to the disposition of approximately $6 million in the reserve fund established to pay late claims and to meet various expenses and contingencies associated with the distribution of the settlement fund.

Also pending is the motion of two former class members to vacate certain administrative orders approving payments from the reserve fund of attorneys' fees and expenses associated with the administration of the settlement fund. These two former class members, Cumberland Farms Dairy, Inc. and Pantry Pride Enterprises, Inc., also seek, through depositions to be taken pursuant to subpoenas duces tecum, to obtain access to records relating to those fees and expenses.

For the reasons which follow, we deny all motions filed by certain former class members and by certain settling defendants for distribution of the reserve fund, either to the former class members and/or to the settling defendants, respectively. We approve the recommendation of the Folding Carton Administration Committee that any reserve funds remaining after all valid claims and expenses have been paid be utilized for research into possible techniques for maximizing competition and preventing or detecting and stopping violations of the antitrust laws or other anticompetitive activity. To that end, we direct the Committee, subject to our approval as to the charter, by-laws, directors, officers and procedures, to establish a foundation to be called "The Antitrust Development and Research Foundation" and to transfer the interest hereafter earned on the reserve fund to the foundation from time to time as it accrues. Finally, we direct that the remaining principal be transferred to the foundation one year from the date hereof. The Administration Committee is also directed to propose steps to locate former class members who have not previously filed claims and assist them in making properly substantiated claims against the reserve fund. The motion of the former class members Cumberland Farms Dairy, Inc. and Pantry Enterprises, Inc. to vacate administrative orders authorizing payment from the reserve fund of administrative fees and expenses is denied and the subpoenas duces tecum are quashed.

The Settlement and Distribution

The approximately $200,000,000 settlement of these class actions was, at the time of its approval, unprecedented in

amount. The complaints had alleged an ongoing conspiracy on the part of the defendants to fix prices and to conceal the existence of the conspiracy which allegedly spanned the years 1960 to 1974. Billions of dollars worth of purchases of folding cartons were involved. And settlement negotiations—undertaken by appointed attorneys for the plaintiff class with the assistance of the Court—were in progress almost from the beginning of the litigation.

The global settlement which we ultimately approved was the result of separate agreements entered into by attorneys for the plaintiff class with each of the various defendants. Each agreement provided that the settling defendant was to pay its settlement share into an escrow fund, the interest on which was to be retained in the fund; identical Escrow Agreements were entered into with each settling defendant. The settlement papers established no basis for calculating the class members' shares or for distributing the settlement funds and it was [1095] understood at the time that a mechanism for pro rata distribution based on class members' purchases would have to be developed. The parties agreed, and we ordered, that no distribution of the funds be made without an order of Court.

The Escrow Agreements recited that the settlement funds were "irrevocabl[y]" transferred for the purpose of satisfying the defendants' possible liabilities and that the defendants had the right to return of the deposited funds only in the case of termination or invalidity of the settlement. Paragraph 11 of the Escrow Agreements—the only paragraph in the Agreements regarding defendants' possible future interest in the fund—provided:

> No Settling Defendant shall have any right, title or interest to any portion of the principal or interest of the Fund until such time as such Settling Defendant, pursuant to the settlements and this Agreement, shall receive return of its contribution to the Fund upon withdrawal from or termination of the Settlements.

None of the contingencies which would have generated an interest of the settling defendants in the escrow funds ever materialized.

The proponents of the settlement, representatives of the plaintiff class, formulated and proposed a plan of distribution of the settlement fund which they submitted together with their memorandum in support of the proposed settlement. The plan of distribution, to which we agreed, was described in the following terms:

> Plaintiffs propose that the distribution to class members be made on a claims made basis. Each participating class member would be required to submit a claim to the Court for approval which would consist of its highest four years of folding carton purchases from defendants during the 1960-1974 period. Record substantiation would be required for each claim, except that where records for less than four years exist an estimate could be provided for the missing years.... Each claimant will recieve [sic] a share of the Fund based upon the claimants' allowed purchases as they relate to the Fund, after deduction of attorneys' fees, costs, administration expenses and reserves ordered by the Court.

Memorandum of Class Plaintiffs in Support of The Proposed Settlements and Proposed Plan of Distribution at 69.

As an appendix to their Memorandum in Support of the Settlement, the class attorneys suggested a form of Notice of Hearing on the proposed settlement and plan of distribution. We approved the form and, prior to the September 13, 1979 hearing on the adequacy of the settlement, *see* Fed.R.Civ.P. 23(e), that form together with an approved claim form was forwarded to all the putative members of the plaintiff class. The recipients of these materials were approximately 6,000 direct purchasers of folding cartons who could be identified from defendants' customer and sales lists.

The class notice described the approximate amount of the settlement and the plan of distribution. In pertinent part it provided:

> Subject to Court approval, proposed settlements in the aggregate principal amount of $199,616,051 have been reached with all of the defendants in the case. Inclusive of interest, it is estimated that the Fund will be $218 million as of January 2, 1980. These figures are before any deduction for attorneys' fees, costs and administrative expenses and reserves which may be ordered by the Court.
>
> * * * * *
>
> THE PROPOSED PLAN OF DISTRIBUTION OF THE SETTLEMENT FUND. On July 9, 1979, plaintiffs submitted to the Court a proposed Plan of Distribution of the Settlement Fund. This proposed Plan of Distribution has been approved by all of the active class representatives and their attorneys, and has been preliminarily approved by the Court subject to modification or final approval after the hearing commencing on September 13, 1979. The proposed Plan of Distribution provides that:
>
> [1096] (a) All class members desiring to participate in the Fund must submit their claims on the Claim Form which accompanies this Notice.
>
> * * * * *
>
> (c) The allowed claims of all class members will be totalled.
>
> (d) Each claimant will receive a share of the Fund based upon the claimant's allowed purchases for any four years from 1960 to 1974 inclusive, as they relate to the Fund, after deduction of attorneys' fees, costs, administrative expenses and reserves ordered by the Court as more fully described in the Claim Form which accompanies this Notice.

The class notice also contained an emphasized waiver provision which stated:

> ANY CLASS MEMBER WHO DOES NOT MAKE ITS OBJECTION, IF ANY, TO THE PROPOSED SETTLEMENTS, THE PROPOSED PLAN OF DISTRIBUTION, OR THE ATTORNEYS' FEES, COSTS, ADMINISTRATIVE EXPENSES, AND *RESERVES* IN THE MANNER SET FORTH IN THIS NOTICE, SHALL BE DEEMED TO HAVE WAIVED SUCH OBJECTION. [Emphasis added.]

The attached claim form advised each plaintiff how to estimate the amount of its recovery. It contained the following instructions:

> ESTIMATE OF YOUR RECOVERY. For purposes of the computation of your recovery, 'Total Defendants' Sales' shall mean the sum of $4,701,604,000, representing the total sales of folding cartons for the period of 1971-1974 by all of the defendants, and 'Net Fund' shall mean the sum of $199,367,285, representing the estimate of the Fund as of an estimated January 2, 1980 distribution date, including an estimate of interest earned and minus an estimate for attorneys' fees and costs and administrative expenses and reserves. To estimate the approximate amount of your recovery from the proposed settlements, make the following calculation: First, divide your total purchases for the four years shown on the Claim Form by Total Defendants' Sales and then multiply the resulting percentage by the Net Fund. The actual amount of your recovery will vary to some extent from the amount obtained by such calculation as a result of the following factors:
>
> (a) Any particular claimant may submit a Claim Form for four years different than 1971-1974. Therefore, Total Defendant Sales for purposes of the calculation may be more or less than the sum of $4,701,604,000 referred to above.
>
> (b) Certain class members may decide not to submit any Claim Form, which would tend to reduce the

amount of Total Defendants' Sales for purposes of the calculation and increase your recovery.

(c) A portion of the claims submitted may be disallowed by the Court upon notice.

(d) On the date of distribution, the Net Fund may be more or less than the estimate of $199,367,285, depending on the actual amount of interest earned to the date of distribution, the valuation of the Federal Paper Company, Inc. notes and warrants, and the actual attorneys' fees, costs, administrative expenses and reserves ordered by the Court.

Prior to the hearing on the settlement, expert opinion was received on the fairness of the proposal. The class plaintiffs' expert estimated that the overcharge attributable to defendants' illegal activity was 3.6% of the selling price on defendants' total sales during the four year period 1971-1974, the period which formed the basis for the settlements. Using the $4.7 billion total sales estimate, total single damages were calculated at $169,200,000. The Court's impartial expert viewed the overcharge rate as approximately 2.6% of the total sales price, yielding an estimated total single damages amount of $122,200,000.

The benefit of the settlement to the plaintiff class is fairly, if rather glowingly, described in the Report of the Folding Carton Fee Committee, an appendix to Pretrial Order 61A, which approved the awards of fees and expenses to the plaintiff class attorneys. The Pretrial Order and its appendix [1097] are reported at *In re Folding Carton Antitrust Litigation*, 84 F.R.D. 245, 254 (N.D.Ill.1979):

> The settlement was the largest dollar settlement in the history of class action litigation at the time it was made, and is the highest [antitrust] settlement ever achieved as a percentage of single damages, *i.e.*, 118% [of the estimated damages to the total class]. Compared to settlements approved as fair, adequate and reasonable in other cases the result is outstanding. For example, in *Newman v. Stein*, 464 F.2d 689 (2d Cir.1972), the Court approved a settlement representing 14% of potential

recovery; in *City of Detroit v. Grinnell Corp.*, 356 F.Supp. 1380, 1386 (S.D.N.Y.1972), *aff'd*, 495 F.2d 448 (2d Cir.1974), the Court approved a settlement amounting to 9-11% of estimated damages; in *In Re Four Seasons Securities Law Litigation*, 58 F.R.D. 19, 37 (W.D.Okl.1972), the Court approved a settlement of less than 8% of estimated damages; in *Helfand v. New America Fund, Inc.*, 64 F.R.D. 86, 92 (E.D.Pa.1974), the Court approved a settlement of 5% of damage claims filed; in *In Re Sugar Antitrust Litigation*, MDL 201 (N.D.Cal.), the Court approved partial settlements of 30.90%, 54.02%, and 47.90% of estimated damages for four years; in *Dorey Corp. v. E.I. duPont de Nemours and Co.*, 426 F.Supp. 944, 947 (S.D.N.Y.1977), the Court approved a final settlement of approximately 55% of estimated damages; in *Mersey v. First Republic Corp. of America*, 43 F.R.D. 465, 1967-69 CCH Fed.Sec.L.Rep. ¶ 92,304 p. 97, 422 (S.D.N.Y.1968), the Court approved a 5-10% final settlement; and in *In Re Anthracite Coal Antitrust Litigation*, 79 F.R.D. 707 (M.D.Pa.1978), the Court approved a final settlement of 28% of estimated damages for four years.

The $35,000,000 [footnote omitted] offered by defendants on March 24, 1977 to settle this litigation amounted to 20% of single damages and was within the range of settlements approved by other courts, indicated above.

* * * * *

The amount should also be viewed in the context of the statute of limitations defense, which in antitrust actions is four years. The conspiracy alleged in the complaints terminated in mid-1974. The government indictments were returned in February, 1976. The four year statute, applicable if fraudulent concealment could not be proved for earlier periods, would go back to February, 1972, leaving only approximately two years and nine months vulnerable to damage, [sic] claims,

absent fraudulent concealment. The $200 million settlement then can be described as more than 200% of single damages for two years and nine months.

It was clearly understood that the principal amount of the settlement fund—$199,616,051 at the time of our approval of the settlement—was subject to deductions for "attorneys' fees, costs and administrative expenses and reserves which may be ordered by the Court." In fact, however, because of profitable investment of the fund as settlements were reached and added to the fund, the actual amount eventually distributed substantially exceeded the total amount of the individual settlements. The aggregate of fees and expenses which we approved was less than the interest earned on the fund and left a balance of more than $8,000,000 in interest available for distribution in addition to the principal of the settlement fund. Thus, after appointment of an Administration Committee to review the documentation and validity of class members' claims against the fund and after recommendations by that Committee with respect to each submitted claim, distribution of some $206,000,000 in cash and in notes and warrants of one of the defendants was made to over 2,500 claimants who filed claims which were satisfactorily substantiated. Distributions to a total of approximately 75 class members who filed properly substantiated late claims were subsequently made out of the reserve fund as follows: $1,548,909 in September 1980; $298,696 in 1981; and $72,627 in 1982. In all, distribution payments have been made to approximately 2,632 class members who [1098] filed valid claims based on approximately $3.6 billion in purchases, or roughly 77% of the total estimated $4.7 billion in purchases for the relevant period. The figures indicate that 97% of the total available funds, exclusive of class attorneys' fees and costs, were paid to these claimants. Thus, those who filed valid claims have already received 163% of their provable single damages using the plaintiffs' expert's 3.6% damage estimate, or 174% of single damages if the 2.6% damage estimate of the Court's expert is used.

Because of the very large amount in the settlement fund as well as the large number of claims against the fund, the

Administration Committee's review and audit of the claims filed was, obviously, a substantial undertaking. The Administration Committee, with our approval, engaged Touche Ross & Co. as accountants to assist in the review and audit of the claims; Analytical Computer Services, Inc. to provide computer services and procedures; LaSalle National Bank to maintain custody of the funds; and Harris Associates to act as investment advisors. Beginning shortly after the approval of the settlement, the Administration Committee, assisted by these technical advisors, began the extensive process of reviewing the submitted claims and conducting individual negotiations with many of the approximately 2,700 class claimants.

As a result of the review, the purchases allowed for purposes of computation of the pro rata shares in the distribution was reduced by over 25%—from over $4,800,000,000 in claimed purchases to approximately $3,900,000,000 of allowed purchases. Thus, the effect of the review and audit process was to distribute to valid class claimants an additional approximately $54,000,000 of the settlement fund. The Administration Committee was also responsible, with the Court's approval, for investment decisions concerning the fund during the interim between its deposit in escrow and its distribution to those class members who filed properly substantiated claims. And the Committee responded to numerous inquiries and concerns expressed by various claimants with respect to all aspects of the distribution process.

The Administration Committee, with the assistance of the supporting services including the accountants and computer services, expeditiously reviewed claims from approximately 2,700 purchasers of folding cartons, each with innumerable purchases over a four year period. The total amount of the purchases reviewed was almost $5,000,000,000. Questions were raised with respect to the eligibility of a substantial number of the purchases, conferences and hearings were held, and innumerable allegedly substantiating documents were examined. Approximately 25% of the originally claimed purchases were rejected, with the result that the

claimants whose purchases were ultimately approved by us received, as previously noted, their allowable shares of an additional $54,000,000 of the settlement fund. Thereafter, the amount due to each successful claimant was calculated and checks in the appropriate amounts sent to each. Ultimately, checks were sent to some 2,632 class members whose claims were approved in an aggregate amount of approximately $208,000,000. At the same time, the Administration Committee, with the assistance of the investment advisors and subject to our final approval, was responsible for the investment and reinvestment of a fund which ultimately grew, as more settlements were made and interest was earned, to well over $220,000,000 and earned interest over the period at an average rate of 15%. All of this was accomplished at a cost of $1,176,000, slightly over one half of 1% of the fund. The entire operation was so well done that not one appeal was filed from our orders approving either rejection or payment of claims after review of the committee's recommendations.

The Administration Committee has from time to time submitted for our review petitions for reimbursement from the reserve fund for fees and expenses, including those of the accountants, computer services, custodian and investment advisors. By specific Administrative Orders, we have approved, based on our careful review of the submitted petitions, disbursements for attorneys' [1099] fees, for accounting fees and computer services, and for banking, escrow and investment advisor fees in an aggregate of $1,176,000, in our judgment a very reasonable amount in light of the time spent, the quality of the services performed, and the amounts involved.

Distributees of the settlement fund, per our Administrative Order No. 17, dated April 14, 1980, received, together with their distribution checks, flyers which read as follows:

> Enclosed is a check for your distributive share of the Folding Carton Antitrust Settlement Fund. If your check is for an amount greater than $4,000, then you will receive additional distribution from the Settlement

> Fund in the form of Federal Paper Board Company notes and warrants shortly. If your enclosed check is for an amount of $4,000 or less, then this check includes your fractional share of Federal Paper Board Company notes and warrants, *and is thus in full distribution of your claim to the Settlement Fund.* [Emphasis added]

We ordered on April 22, 1980, that those whose cash payment exceeded $4,000 and who therefore also received notes and warrants of defendant Federal Paper Board Company, receive together with their distribution a notice stating:

> The enclosed Federal Paper Board Company notes and warrants represent final distribution of your share of the Folding Carton Antitrust Litigation Settlement Fund . . . . *Your claim to the settlement fund is now fully satisfied.* [Emphasis added]

See Administrative Order No. 20. The actual distribution and receipt of these notices occurred shortly after April 22, the date of Administrative Order No. 20.

Pursuant to the settlement agreement, a portion of the settlement fund was allocated to a reserve fund to cover expenses, costs and fees related to the administrative portion of the action, corrections to claims arising after the first distribution and to cover payment of late claims against the fund. Administrative Order No. 10, dated March 6, 1980, which substantially approved the Administration Committee's first distribution recommendation, accordingly directed that the settlement funds remaining in escrow after the distribution be held in escrow and reinvested until further order of Court. As of March 31, 1982—after drawing on the funds to cover payment of the late claims referred to above as well as various administrative expenses, $5,729,550 remained in the fund. That amount has continued to earn interest and the reserve fund is now estimated to be approximately $6 million.

These Proceedings

As a result of various factors including high investment yield on the settlement fund, exceptionally low per dollar

administration expenses and a small and dwindling number of late claims filed, the amount now remaining in the reserve fund is in excess of what the Court or any of the parties to the settlement and distribution originally estimated. It now seems probable that the reserve fund exceeds the amount of any possible future administration costs as well as possible future claims of class members, although we note that if even a fraction of the purchasers who have not heretofore filed claims based on their purchases were to do so and their claims were allowed on the same basis as those of the class members whose claims have previously been paid, the reserve fund would be inadequate. *See* footnote 9, *infra.*

In light of this probability, we face a novel administrative problem—the result primarily of the high income earned on the unprecedented amount involved in this settlement as a result of outstanding investment decisions, fewer late claims and lower administration expenses than anticipated. That problem is how to dispose of the funds remaining on account after defendants have relinquished all right to them and after all claiming class members have been paid substantially more than the aggregate settlements, more than anyone anticipated, and have received notice as provided in the Court-approved settlement and distribution [1100] plan, that no further distribution would be made to them.

Beginning in October 1980, certain of the former claiming class members made inquiries of the Administration Committee and the Court with respect to the disposition of the reserve fund. Motions have now been filed by a comparative handful of the 2,632 class members who filed claims which were allowed, including Hartz Mountain Corporation, G. Heileman Brewing Co., Grist Mill Co., Cumberland Farms Dairy, Inc., Food Fair, Inc. and Beatrice Foods Company, requesting distribution of the excess reserves to those members of the former plaintiff class who have previously been allowed claims against the fund. Various defendants, Mead Corporation, Alton Boxboard Company, Industrial Paper Company, Champion International Corporation and Federal Paper Board Company, have each filed motions arguing in effect that, since members of the plaintiff class

who filed claims have been more than adequately compensated and were on notice that they had received their full and final distributions, any amounts in the reserve fund that cannot now be distributed as contemplated in the notice of settlement should be distributed pro rata to the settling defendants.

The Administration Committee has filed briefs supporting distribution of the excess reserves to a not-for-profit educational foundation dedicated to public interest research concerning the effective judicial and legal management of complex and multidistrict litigation, competition and the enforcement of the antitrust laws. Specifically, the Administration Committee suggests that the foundation be responsible for the following undertakings:

1. The research, study and promotion of judicial and legal management of complex and multi-district litigation with particular emphasis on the procedural and substantive aspects of the antitrust laws.

2. The promotion of research, study and implementation of the antitrust laws including, but not limited to the interplay of the federal and state antitrust laws, the federal and foreign antitrust laws, and the antitrust laws and other areas of the law.

3. The payment of late claims for folding carton purchases falling within the class definition for the Folding Carton Antitrust Litigation.

Also before us is a related motion of the former class members, Cumberland Farms Dairy, Inc. and Pantry Pride Enterprises, Inc., purportedly on behalf of themselves and the other claiming former class members, to vacate certain Administrative Orders[1] awarding fees and expenses out of the reserve fund, the ownership of which they also claim.

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[1] Administrative Orders numbered 4, 6, 7, 9, 16, 21, 23, 24, 26, 28, 34-37, 41, 42 and 46, which are dated between November 2, 1979 and August 24, 1982, are now sought to be vacated.

The Administration Committee has filed a brief in opposition to this motion challenging its timeliness and the standing of the two movants to challenge the Administrative Orders. The Administration Committee further contends that the fees and expenses were reasonable in any event.

The Legal Status of the Reserve Fund

It is clear that the settling defendants can lay no claim to legal ownership of the reserve fund. The settlement papers signed by each defendant unambiguously provided that the defendants' payments into escrow of their settlement liabilities constituted irrevocable transfers subject only to possible subsequent invalidity or termination of the settlements, contingencies which never occurred. Defendants have not contended that these agreements should now be subject to reformation—an argument for which there appears to be very little basis in any event. *See Beecher v. Able*, 575 F.2d 1010, 1015 (2d Cir.1978); *Haas v. Pittsburgh National Bank*, 495 F.Supp. 815 (W.D.Pa.1980); *see also Pennsylvania R.R. v. United States*, 98 F.2d 893, 894 (3d Cir.1938) (rejecting railroad's contention [1101] that it was the beneficiary of a "resulting trust" consisting of the unclaimed residue of a judgment fund into which it had paid). The defendants have relinquished any claim to any portion of the settlement fund and therefore lack any possible claim to the reserve fund.

The bulk of the argument advanced by the several former claiming class members in support of their claim to the reserve fund is that they are legally entitled to "return" of the funds which, they contend, were "erroneously taken" from them. We conclude that the former class members, like the settling defendants, do not have a legal or equitable interest in the fund.

We turn initially to the Administration Committee's argument that the former class members, by failing to object to the settlement and distribution procedure described in the 1979 class notice, have waived any right to object to disposition of the reserve fund. The Committee's position is based on the waiver clause of the class notice, quoted above, which

provided that failure to object to the plan of distribution and to the reserves in the manner set forth in the notice constituted waiver of objection. Since no objection was raised to the creation of the reserve fund or to the formula for determining the amount to be distributed to each class member—a formula which was carefully adhered to—the Committee contends all class members have waived any claim to the reserve fund.

It is, of course, accurate that no objection was raised. It is also true that—although there was certainly some probability, as is usually the case in class action distributions, that the reserve fund would contain an excess over all claims and expenses—it did not become clear until two years after the September 1979 hearing on the class settlement how much might be remaining in the fund. Accordingly, the former class members' failure to raise contentions with respect to possible distribution of any excess amounts in the reserve fund may arguably not have constituted a waiver of their right to object to present distribution proposals. *Cf. Curtis Publishing Co. v. Butts*, 388 U.S. 130, 142-45, 87 S.Ct. 1975, 1984-86, 18 L.Ed.2d 1094 (1967). In any event, while it may well be that former class members whose claims were paid waived any claim to the reserve fund, we will nevertheless consider their contention that they are the legal owners of that fund.[2]

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[2] It does not follow, however, that Fed.R.Civ.P. 23 or the Due Process Clause of the Fifth Amendment of the United States Constitution require that notice of these proceedings initiated by a handful of former class members be provided to all former class members, as certain of the movants argue. Federal Rule 23 requires only that notice of dismissal or compromise of class actions, Fed.R.Civ.P. 23(e), be provided.

No one now contends that the 1979 notice of dismissal of these actions was inadequate under Fed.R.Civ.P 23(e) or the Due Process Clause; it clearly was adequate. *See generally Reynolds v. National Football League*, 584 F.2d 280, 285 (8th Cir.1978); *In re Equity Funding Corp. of America Securities Litigation*, 603 F.2d 1353, 1361 (9th Cir.1979). Pursuant to that notice, these actions have been dismissed and all of the claiming class members accepted, without objection, final distribution of their shares of the settlement fund. Since their claims have been dismissed and they

(footnote continued on next page)

The notice of settlement and the claim form, previously quoted, define the legal entitlement of the class members to the settlement fund. Essentially, the claimants argue that those documents establish that their bargain was for a share—to be determined on the basis of the number and [1102] amount of the claims actually filed—of the total settlement fund, less attorneys' fees, costs and reserves held back as insurance against late claims and possible miscalculation in the settlement distribution. They argue that, so long as there remains any amount in the settlement fund which is not necessary to meet the expenses and contingencies for which deductions were anticipated, their claims have not been "fully satisfied" under the terms of the settlement arrangement and they are therefore entitled to the excess funds.

The relevant documents clearly indicate, however, that the basis for the total settlement bargain for each class member was that class member's fractional share alone of total purchases in the relevant period. The claim form did state that "[t]he actual amount of [each class member's] recovery will vary to some extent" from the estimation derived on the basis of share of total purchases, as a result of various factors including, among others, the fact that some purchasers might not file claims. However, the basis for estimation of

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(footnote continued from preceding page)

have received final distribution in accordance with the terms of the approved settlement, the former class members are not entitled to any further notice in this case. *Cf. Chlupsa v. Posvic*, 113 F.2d 375 (7th Cir.1940) (no class notice necessary prior to entry of post-judgment order permitting defendant's receiver to compromise indebtedness found by money decree).

In any event, we have no doubt that those several former class members who have already appeared and moved for pro rata distribution to them of the reserve fund represent the interests of any of the class claimants. There is no basis for bringing all possible claimants before the Court when their interests will be adequately represented by the class movants who are identically situated. *Cf. Hartford Life Ins. Co. v. IBS*, 237 U.S. 662, 672, 35 S.Ct. 692, 695, 59 L.Ed. 1165 (1914) (judgment concerning disposition of a mortuary fund binding on non-parties to suit whose interests were adequately represented).

the recovery and, it must follow, for the class members' entry into the settlement bargain was each claimant's fractional share of total purchases. *See* Claim Form, § 9.

We agree with the proposition that the class members were to receive a variable share of the settlement fund. We are unable to concur, however, in the second step of the argument that the entitlement to a variable share amounts somehow to a legal claim on the reserve fund. The uncontrovertible fact is that the bargain has been carried through and the variable shares to which claiming class members were entitled have been fully distributed. In fact, the class members who filed claims established that they made 77% of the relevant purchases but have already received roughly 97% of the settlement fund, a substantial, advantageous variance from the expected and projected terms of the bargain.

We are aware of one fairly close analogy to the situation here and that analogy supports the conclusion we reach. In *In re Vulcan & Reiter Co.*, 162 F.2d 92, 94 (2d Cir.1947), a bankruptcy creditor who had received his share in a creditors' composition sought to obtain funds remaining on deposit in court after distribution to creditors of their composition shares. Even though the amount which the creditor sought to recover was less than the unpaid balance of his original debts, the attempt was unsuccessful. The court concluded—as we conclude here with respect to the former class members—that the creditor had already had the benefit of his bargain and was entitled to nothing more.

Moreover, the former class claimants have already agreed that their claims against the fund have been fully satisfied. Every class member who filed a valid claim against the settlement fund and received a distribution from it was informed that its distributed share was final and represented

full satisfaction of its claims against the fund. *See* Administrative Orders 17 and 20. Not a single distributee contested the finality of the distribution to it at that time.[3]

[1103] Accepting the argument that the former class members are now legally entitled to "return" of the reserve fund would compromise the important policy of finality in class action distributions. The clear intent of Administrative Orders 17 and 20, as well as that of the allocations to the reserve fund, was to avoid prolonging and complicating the settlement distribution process. The finality of the distributions was clearly and unambiguously expressed in order to protect all of the parties concerned and to reduce the costs of settlement administration. We will not disregard the clear and unequivocal understanding that the distributions to the claiming class members were final distributions which extinguished their claims to the settlement fund.

The claimants emphasize that the class was a group of approximately 2,632 whose identities and pro rata shares of the settlement are known and that distribution of the $6 million to them could be accomplished efficiently and at relatively moderate expense. Those facts do not, however,

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[3]The claiming former class members suggest that second distributions are commonplace in class action litigation that has resulted in the establishment of a settlement fund. However, the cases relied upon for this proposition, *In re Eastern Sugar Antitrust Litigation*, MDL 201A (E.D.Pa); *In re Cenco*, MDL 291 (N.D.Ill.); *In re Equity Funding Corp. of America Securities Litigation*, MDL 142 (C.D.Cal.); *Mary Green v. Occidental Petroleum Corp.*, Civ. 71-591 RJK (C.D.Cal.), all involved a prior understanding that subsequent distributions would be made.

In *Eastern Sugar*, the first distribution notified claimants that they had received 80% of what they were entitled to. In *Mary Green*, the order authorizing the distribution stated that each claimant would receive 50% of its claim in the first distribution and 50% in the second. In *Equity Funding*, approximately 20% of the settlement funds were held back during the first distribution for the benefit of so-called "settlement fund B" group claimants. In *Cenco*, the "second distributions" were distributions of additional settlements received; it was understood that the "first distribution" represented only a partial settlement of the action. No additional settlements were made and no additional funds were received in the instant case after the plan of distribution was approved.

establish the right of any or all of them to the reserve fund. The fact that further distribution to them would not be a complicated process and that the reserve fund would not necessarily be exhausted in the process of a further distribution to the already well compensated former class members provides no legal basis for upsetting the finality of the settlement distribution.

It may be noted in passing that counsel for the plaintiff class have also been well compensated for their services to the class, having received, with our approval, approximately $13,500,000. To the extent that they would share in any further distribution to clients who were members of the class, and we are aware that most of them had contingent fee agreements with clients who were class members since we took those agreements into account in awarding fees, they would be excessively compensated. Those counsel who were not compensated from the settlement fund have, we assume, been paid by their clients for whatever services they may have rendered, whether under contingent fee agreements or otherwise. Since all counsel who represented the class and performed the services which generated the settlement fund have received full compensation for their services, there would appear to be no justification for further compensation to any attorneys whether class counsel or not.

All of the movants before us appear to agree that the members of the plaintiff class who did not file claims have no legal interest in the reserve fund. These absent class members—whatever may be their equitable status—failed to file timely claims against the settlement fund. Although it was within our discretion to allow their late claims,[4] a procedure to which no one has objected in any event, the non-claiming class members clearly have no present legal ownership interest in the fund. *See, e.g., Illinois Bell Telephone Co. v. Slattery*, 102 F.2d 58, 66-67 (7th Cir.1939); *In re*

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[4] Payments to late claimants were also made without discussion or objection in *State of West Virginia v. Chas. Pfizer & Co.*, 314 F.Supp. 710 (S.D.N.Y.1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *aff'd*, 404 U.S. 548, 92 S.Ct. 731, 30 L.Ed.2d 721 (1971).

General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1135 n. 51 (7th Cir.) (dicta), *cert. denied*, 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95 (1979).

We have also considered the possibility that the reserve fund may have escheated either to the State of Illinois or to the United States government. The statutes which would govern that event are inapplicable by their terms, however. The federal statute, 28 U.S.C. § 2042, applies only where "money" has been "deposited in court" for at least five years and the right to the money "has been adjudicated or is not in dispute." Five years has not elapsed, these funds have not been "deposited in court" and the right to them is hotly contested. Similarly, Ill.Rev.Stat. ch. 141 §§ 101, *et seq.*, vests no interest in the state until property held "in a fiduciary capacity," Ill.Rev.Stat. ch. 141 § 107, or by a court, Ill.Rev.Stat. ch. 141 § 108, has gone unclaimed for a period of seven years.

[1104] *Equitable Considerations*

We recapitulate: the settlement agreements and the plan of distribution in these lawsuits might have provided for "recapture" of excess reserves by the settling defendants; they might also have provided for a supplemental distribution of excess funds to those class members who filed valid claims. In fact, no provision was made for disposition of excess funds remaining in the settlement account either to defendants or to the class members. On the contrary, far from providing for recapture by defendants or supplemental distribution to the already compensated claimants, the clear terms of the settlement and distribution agreements foreclose any legal interest of either group in the reserve fund.

As is clear from the relevant documents, the reserve fund was established primarily as an accommodation to plaintiff class members who failed to file claims in advance of the date set for distribution of the settlement and for payment of administrative fees and expenses which, it was understood,

would be substantial. Our minimal[5] allocation to reserves reflected the judgment that every opportunity should be afforded class members who had not filed claims to come forward and collect their rightful share of the settlement. Although a cutoff date for the filing of claims was established, we have consistently paid properly substantiated late claims out of the reserve fund. This was a policy conceived out of fairness to those smaller class members who faced particular difficulties filing or substantiating their claims as well as to those class members who, for whatever reason, might not have had notice of their possible interest in the settlement. *See generally Zients v. LaMorte*, 459 F.2d 628, 630 (2d Cir. 1972). No party has ever objected to this practice.

As matters now stand, we are obliged to determine the disposition of a fund, subject to our jurisdiction and control, to which no contender has a legal right: not the settling defendants, who have expressly relinquished any interest in the fund; nor the claiming plaintiffs who have received and acknowledged full satisfaction of their claims against the fund; not their already well compensated counsel; not even the non-claiming former class members who have failed to file timely claims against the fund.

Although the situation with which we are faced is, so far as the size of the reserve fund is concerned, an unprecedented one, we are not wholly without guidance in our resolution of the question. In virtually every class action, there remains a reserve fund after all claims and expenses have been paid. Applying a *cy pres* concept, courts have directed that such funds be turned over to organizations serving the public interest such as law schools, state attorneys general, the American Bar Foundation, the Chicago Bar Foundation, and others. Moreover, it is well recognized that the administration of class actions, particularly of the multidistrict variety, will present novel and unanticipated administrative

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[5] Less than 3% of the total settlement was allocated to the reserve fund. At the time of the allocation, the suggestion was made, and rejected by us, that fully 10% of the settlement be allocated to reserves.

difficulties. We are admonished to respond with flexibility and imagination. Miller, Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3), 54 F.R.D. 501, 510-11 (1972); *see also* Manual for Complex Litigation § 1.43 (1982). That admonition reflects in part the equitable origin of the class action device, *see Hansberry v. Lee*, 311 U.S. 32, 41, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940); *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir.1948), a setting characterized by innovation consistent with settled principles. 1 Pomeroy, Equity Jurisprudence § 60 (Symons ed. 1941).

The Seventh Circuit, in a case which presented the converse of the problem we face today, adverted to the pivotal role of equitable principles in apportioning class action settlement funds. In affirming the district court's allocation, the court stated:

> [1105] [T]he allocation of an inadequate fund among competing claimants is a traditional equitable function, see Chafee, Some Problems of Equity 169-70, 223 (1950)—using equity to denote not a particular type of remedy, procedure, or jurisdiction but a mode of judgment based on broad ethical principles rather than narrow rules. *Cf. Zients v. LaMorte*, 459 F.2d 628, 630 (2d Cir.1972). To make an equitable allocation in this case the judge did not have to resolve trial-type issues of liability and therefore did not have to conduct a trial. He had only to weigh the relative deservedness of Curtiss-Wright and the other class members, and he could do this on the basis of the undisputed facts before him.

Curtiss-Wright Corp. v. Helfand, 687 F.2d 171, 174-75 (7th Cir.1982). Faced with the more closely analogous problem of how to dispose of unclaimed portions of settlement funds, courts have the power and the responsibility to exercise equitable discretion to achieve substantial justice in the distribution of the funds. *See Beecher v. Able, supra*, 575 F.2d at 1016; *see also* 3 Newberg, Class Actions § 5620j (1977).

As previously indicated, there are three identifiable groups who might lay claims to the reserve fund: the settling defendants, the claiming former class members (and their counsel), and the non-claiming or absent former class members. We turn now to consideration of the "relative deservedness," *Curtiss-Wright Corp., supra*, 687 F.2d at 174, of these groups, a determination which must be informed by the punitive and compensatory policies of the antitrust laws, the wrongdoing or "unclean hands" of each group and the extent to which each has been compensated for any actual injury it may have suffered. *Cf. United States v. Morgan*, 307 U.S. 183, 194, 197-98, 59 S.Ct. 795, 801, 802, 83 L.Ed. 1211 (1939) (court of equity, which molds its remedies in light of public policy, should not distribute funds on deposit until claimants' relative entitlements have been determined).

The overriding Sherman Act policy of deterring price fixing violations—conduct for which many of these defendants or their officers had previously been criminally convicted—is the most important factor in assessing the defendants' possible equitable entitlement to the reserve fund. That policy is beyond question. *See Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494, 88 S.Ct. 2224, 2232, 20 L.Ed.2d 1231 (1968) (rejecting pass-on defense in part because its application might permit Sherman Act violators to "retain the fruits of their illegality"); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46, 97 S.Ct. 2061, 2074, 52 L.Ed.2d 707 (1977).

Even the defendants do not argue very strenuously that the reserve fund should be "returned" to them, although they suggest equitable considerations which they assert warrant return of the fund to them in lieu of *cy pres* distribution of the funds. Specifically, they urge that the members of the plaintiff class whose claims were paid have already received compensation far in excess of what anyone anticipated at the time the settlements and plan of distribution were approved and were on notice and acknowledged that they had received their full and final distribution. While we recognize these facts, in light of the Sherman Act policy of deterrence and

the defendants' wrongdoing, we reject their equitable claim to the fund. *See Beecher v. Able, supra*, 575 F.2d at 1016; *cf. Hansen v. United States*, 340 F.2d 142, 144 (8th Cir.1965) (no equitable basis for return of illegal rent overcharges).[6]

We find almost equally unpersuasive the equitable claim of the claiming former class members (and their counsel) to these funds. The crux of their argument is that because their complaints originally covered an alleged 15 year conspiracy and because [1106] the Sherman Act provides for treble damage recovery, the terms of the settlement do not award them "their [full] out-of-pocket losses." They argue that, even though the final distribution to them in accordance with the agreed-upon plan of distribution has already resulted in their obtaining between 163% and 174% of their estimated single damages ("out-of-pocket losses") for the four year period 1971-74, an additional distribution to them of the reserve fund would only constitute deserved "compensation."

The benefit of the settlement to the plaintiff class has already been the subject of extended briefing and of a hearing in this Court. We approved the settlement on the premise that members of the plaintiff class would recover approximately 118% of their single damages for four of the alleged fifteen years of the price fixing conspiracy—a percentage and amount substantially below that (163%-171%) which the claiming class members actually recovered.

No one could seriously suggest that the settlement, which was unprecedented both in absolute amount and in percentage of alleged single damages recovered, was not an outstanding result from the point of view of the class plaintiffs. *See In re Folding Carton Antitrust Litigation, supra*, 84 F.R.D. at 254, 268-69. That point has been made repeatedly, not least forcefully by the attorneys for the plaintiff

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[6] We do not accept the argument of certain defendants that rejecting the claiming former class members' right to these funds would oblige us to "return" them to the settling defendants rather than distribute them in a fashion that would indirectly benefit the entire plaintiff class as well as the general public.

class themselves. *See* Confidential Memorandum in Support of Proposed Settlements and Plan of Distribution 65-68.

Moreover, it is an economic fact of which we can take judicial notice that the members of the plaintiff class, none of whom were ultimate consumers, in almost every instance had no "out-of-pocket losses" at all. Since virtually all purchasers of folding cartons were subject to the price-fixing conspiracy here alleged, the probabilities are that most, if not all, of the class members included the total cost of their folding carton purchases in the costs on the basis of which they calculated their profits and then passed those costs and the profit thereon to their customers.[7] While this "pass-on" is no defense so far as the defendants are concerned, *see Hanover Shoe, Inc., supra*, it is relevant to our analysis of the equitable entitlement of the class members whose claims were paid. We cannot overlook in connection with our equitable analysis the fact that these claimants have already received between 163% and 174% of the estimated overcharges which they paid in the highest four years of their purchases between 1960 and 1974, overcharges which in almost every instance they had already passed on with a profit to their customers.

The claiming former class members' contentions that they have not been properly compensated and are therefore equitably entitled to an additional distribution proceed from the assumption—for which there is absolutely no demonstrated basis—that the class could have recovered treble damages for the entire 15 year period for which a conspiracy

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[7] The originally certified class in this litigation included both direct and indirect folding carton purchasers. The Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), intervened, prompting decertification of the indirect purchasers. Although the Court in *Illinois Brick* refused to allow indirect purchasers to sue for antitrust injury allegedly passed on to them, the opinion acknowledged that overcharges are in fact passed on—a matter of common knowledge—but that the substantial difficulty of calculating and apportioning such losses should preclude indirect purchasers from consuming judicial resources in attempting to demonstrate them. *See* 431 U.S. at 740-46, 97 S.Ct. at 2071-75.

was alleged. In fact, use of a four year period for damage estimation may well have worked a benefit to the class plaintiffs who, had they failed to show at trial that the alleged conspiracy was fraudulently concealed, might have recovered for only two years and nine months of alleged overcharges. *In re Folding Carton Antitrust Litigation*, 84 F.R.D. at 254, 269; *and see In re Anthracite Coal Antitrust Litigation*, 79 F.R.D. 707, 714 (M.D.Pa.1978). The use of four years in the settlements and in the distribution formula was clearly a reflection of some uncertainties with respect to liability and the period of damages which could be established.

[1107] Moreover, as previously discussed, in measuring the deservedness of the claiming former class members to additional settlement funds—as distinct from what might have been their legal rights had this litigation proceeded through trial on the merits—we may properly take account of the near certainty that they passed on to their customers most, if not all, of the overcharges to which they were subjected. Though they refer to themselves in their briefs as "injured" in the amount of defendants' overcharges, equity must recognize that they may well have suffered actual losses substantially below the amount of those alleged overcharges or, more probably, both recovered any overcharges and enjoyed a profit on them.

The attempt of a few former class members to assert an equitable interest in the reserve fund is rendered anomalous by the simple fact that these claimants and their attorneys have already been more than amply compensated for their diligence in enforcing the antitrust policies of the Sherman Act. In light of the terms of the settlement and the even more generous distribution already made, it is apparent that a further distribution to class members who voluntarily settled their claims for the substantial amount they have already received, would be an undeserved windfall.[8] *Cf. Van*

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[8] It follows from our conclusion that the claiming former class plaintiffs have neither a legal nor an equitable claim to the reserve fund that we

(footnote continued on next page)

Gemert v. Boeing Co., 553 F.2d 812, 815-16 (2d Cir.1977) (affirming district court's refusal to redistribute unclaimed portion of securities fraud judgment among those who had already appeared and collected their share).

In contrast, the equitable claim on these settlement funds of the non-claiming class members is substantial. They furnished equal consideration for the settlement in this litigation in that their purchases formed part of the base of the various settlements. Moreover, they too are bound by the final judgment. Even though the settlement fund was established for their benefit and, in effect, paid for in part with consideration furnished by them, the nonclaiming class plaintiffs have to date received no direct or indirect benefit from the settlement fund. In a related context, the Supreme Court has recently remarked that "members of the class, whether or not they assert their rights, are at least the equitable owners of their respective shares in the recovery." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 481-482, 100 S.Ct. 745, 750, 62 L.Ed.2d 676 (1980) (holding that attorneys' fees could not be paid out of unclaimed recovery in securities fraud case where fund was created by final judgment entered after trial on the merits).

What is more, the reserve fund itself was established for the express purpose of benefiting those class members who might appear and file late claims. The conclusion seems unavoidable that those class members who have not come forward to receive their intended benefit have an equitable claim to the reserve fund. It is beyond question that these class members' claims are equitably superior both to those of the settleing defendants on account of whose wrongdoing the settlement fund was created and to those of the class members who have already received substantially more than their anticipated share of the fund.

(footnote continued from preceding page)

need not solicit them for their consent, as suggested, to contributing a portion of "their share" of the reserve fund to another purpose. *See* Petitioners' Response to the Administration Committee's Surreply 2-3.

Disposition of the Fund

The superior equitable claim of the non-claiming class plaintiffs to the reserve fund constitutes the focal point for our deliberations with respect to its proper disposition. Unfortunately, recognition of that superior claim does not resolve the distribution question in this case. The difficulty of distributing the reserve fund fairly among the non-claiming class members is obvious. Although the defendants' purchaser lists, which were used to identify the 35,000 entities who received original notice of the pendency of this litigation and the 6,000 who were notified of the settlement, are still available, their value for determining [1108] the true identity and the share of the absent class members must, realistically, be viewed as limited. Those lists provide no indication of the relative purchases of those who are identified as defendants' customers. The corporate identity of some of those who appear on the lists has changed or may even have terminated, a fact which became apparent in 1979 when we were unable to contact by mail some of those on the lists. And, what is most significant, neither the notice that was mailed to those on the lists nor the wide publicity that this settlement received through the media has yielded properly substantiated claims with respect to nearly 25% of the folding carton purchases for the relevant four year period.[9] More than three years have now elapsed since the approval of this settlement and we must now recognize the reality that we will probably never be able properly to verify all the unaccounted for purchases and purchasers.

The claiming former class members appear to suggest that the relative facility with which these excess funds could be distributed to them should warrant our ruling in their favor. As already noted, we agree that these former class members,

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[9] If all of the non-claiming purchasers of the nearly 25% of total purchases were to file valid claims and receive distributions on the same ratio as the class members whose claims were paid, they would be entitled to over $50,000,000, far in excess of the reserve fund. Moreover, some of the late filing claimants whose claims were allowed were paid at a lower percentage rate than those who filed timely claims. The equitable considerations in a further distribution are obviously complex.

who have filed properly documented claims representing 77% of the relevant sales and who have already received pro rata 97% of the settlement, can be easily enough identified for further distributions. However, we do not accept the implication that considerations of expediency should be allowed to obscure the equitable principles that we have analyzed above. Though the claiming former class members can be readily identified and the non-claiming class members cannot, the "relative deservedness" of the latter group is obvious.

The position of the Administration Committee, which we accept in principle, is that we should do the best we can, under the circumstances, to achieve a disposition of the reserve fund which advances the Sherman Act policies pursuant to which the settlement fund was created and which—even if indirectly—benefits those absent class members for whom the fund was established. The Committee suggests that we should explore the concepts of *cy pres* or "fluid class recovery" for what guidance they may offer in achieving an equitable disposition.

Essentially, we are urged to apply the proposition—one with equitable origins of its own—that where distribution to the class who should ideally receive a fund is impracticable or inappropriate, the distribution should be made in the "next best" fashion in order as closely as possible to approximate the intended disposition. This is the central concept of both the *cy pres* and fluid class recovery theories—the terms appear to be used interchangeably in the literature, *see* The *Cy Pres* Solution to the Damage Distribution Problems of Mass Class Actions, 9 Ga.L.Rev. 893, 894-95 (1975)—and it is this concept, rather than any possibly tainted label with which we are concerned today. The notion that the unclaimed portion of a class action recovery in particular may be applied *cy pres*, as nearly as possible, to the failed or unachievable purpose for which the recovery was collected, has gained the support of scholars and commentators. *See, e.g.*, Note, 9 Ga.L.Rev. 893 (1975); Comment, Damage Distribution in Class Actions: The *Cy Pres* Remedy, 39 U.Chi.L.Rev. 448 (1972); Jacoby and Cherkasky, The

Effects of *Eisen IV* and Proposed Amendments to Federal Rule 23, 12 San Diego L.Rev. 1, 20-27 (1974).

The problem in class action litigation of an unclaimed surplus of funds collected pursuant to settlement is, as the literature and the cases document, a recurrent one. Use of a *cy pres* mechanism is an apparent solution to this problem. At least one antitrust settlement agreement has expressly [1109] provided that the unclaimed surplus, which could have been as much as $20 million, be turned over to certain state attorneys general for use in pro bono projects that would benefit consumers who might have been adversely affected by the defendants' illegal activities. *State of West Virginia v. Chas. Pfizer & Co.*, 314 F.Supp. 710, 728, 733-34 (S.D.N.Y.1970), *aff'd*, 440 F.2d 1079, 1084, 1091 (2d Cir.), *aff'd by an equally divided court*, 404 U.S. 548, 92 S.Ct. 731, 30 L.Ed.2d 721 (1971).

We are fully aware that the *cy pres* and fluid class recovery distribution theories have been the subject of controversy. While some courts appear to have endorsed the principle, *see, e.g., Bebchick v. Public Utilities Commission*, 318 F.2d 187, 203-04 (D.C.Cir.) (market distribution of rate overcharge; non-class action), *cert. denied*, 373 U.S. 913, 83 S.Ct. 1304, 10 L.Ed.2d 414 (1963); *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 63 Cal.Rptr. 724, 433 P.2d 732 (1967) (California procedural law); *Simer v. Rios*, 661 F.2d 655, 675-77 (7th Cir.1981) (fluid or *cy pres* distribution proper only where recovery is under a statute embodying policies of deterrence, disgorgement and compensation), *cert. denied*, 456 U.S. 917, 102 S.Ct. 1773, 72 L.Ed.2d 177 (1982), others have flatly rejected its validity, *see, e.g., Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1016-18 (2d Cir.1973), *vacated on other grounds*, 417 U.S. 156, 172 n. 10, 94 S.Ct. 2140, 2150 n. 10, 40 L.Ed.2d 732 (1974); *In re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir. 1974); *City of Philadelphia v. American Oil Co.*, 53 F.R.D. 45, 72 (D.N.J. 1972).

We do not believe that it is necessary for us to enter this debate. The objections to fluid class or *cy pres* recovery voiced in *Eisen, supra*, and similar cases have centered on

the impermissibility of using such recovery to allow an otherwise allegedly unmanageable class action to proceed to trial. In that context, some courts have viewed these recovery mechanisms as inconsistent with Fed.R.Civ.P. 23 and, alternatively, due process. By contrast, we are presented here with what is in effect a *fait accompli:* the class members who filed claims have been substantially compensated yet the reserve fund remains and must be allocated to some appropriate use. We are not now making the determination whether the fund may be established in the first place consistent with the federal rules and the due process clause. *Cf. Beecher v. Able, supra*, 575 F.2d at 1016 n. 3 (defendant may agree to a settlement which provides for fluid recovery notwithstanding the *Eisen* rule).

We are not aware of any judicial opinions dealing with the question whether, after the fact, the *cy pres* distribution mechanism may be used to dispose of unclaimed settlement funds for which there is no legal owner. As previously indicated, we are aware of situations in which it has been applied.[10] In light of the willingness of a number of courts to extend the doctrine to the class action setting and, we must add, in light of the manifest inadequacy of the alternative solutions that have been proposed, we conclude that a *cy pres* approach is the correct one here.

We note that, because this fund already exists, the analogy between this case and the trust law origins of the *cy pres* doctrine is a particularly close one. We have already subject to our control a substantial fund, originally allocated to a reserve in part in order to benefit those members of the

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[10] Allocation of the unclaimed residue of a settlement fund to a charitable or pro bono purpose has on previous occasions been made, but never—so far as we are aware—with an opinion. *See, e.g., Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, CA No. 71774 SC (E.D.Pa. Feb. 28, 1978) (approximately $25,000 to two law schools to establish loan funds for needy students at those institutions); *State of Illinois v. J.W. Petersen Coal & Oil Co.*, No. 71 C 2548 (N.D.Ill March 15, 1976) (distribution of one-half of the unclaimed residue to the Chicago Bar Foundation and one-half to the Chicago Lawyers Committee for Civil Rights).

plaintiff class who had yet to file their claims, which, it is now apparent, may not fully be put to that intended use. Those who contributed to the fund never had any expectation that it would be returned to [1110] them. Those who filed claims have been fully and well paid. We have the authority to accomplish what may fairly be termed the "general intention" of the allocation to reserves—enforcement of the antitrust policies and benefit to the absent class members—by substituting another purpose which approximates as closely as possible the failed one. *See generally Noel v. Olds*, 138 F.2d 581, 587 (D.C.Cir.1943), *cert. denied*, 321 U.S. 773, 64 S.Ct. 611, 88 L.Ed. 1067 (1944).

We know of no fairer or more equitable way to dispose of the reserve funds than to allocate them to a use which will serve the Sherman Act policies of antitrust enforcement, deterrence and fair competition while providing some indirect benefit not only to the uncompensated members of the plaintiff class, but also to the general public, the ultimate consumers of folding cartons who were really the persons adversely affected by defendants' activities as well as to those class plaintiffs who have already received their final distribution.

The Administration Committee has proposed that the reserve funds be used to establish a tax-exempt foundation whose purposes would be (1) research, study and promotion of judicial and legal management of all complex and multidistrict litigation, particularly antitrust litigation; (2) promotion of research, study and implementation of various aspects of the antitrust laws; and (3) payment of possible future late claims in this case.

In principle, we accept the Committee's proposal with the following qualifications: First, we observe that the superior equitable claims of the non-claiming class members to these funds has motivated in part our decision to accept the Committee's proposal. It is essential, in our view, therefore, that prior to full commencement of the foundation's activities, a final effort be made to locate the non-claiming members of the plaintiff class and to assist them in making proper claims

against the remaining reserve funds. We therefore direct the Administration Committee to propose steps for our approval to accomplish this. The principal of the reserve fund should be held available for a period of one year from the date of this opinion to cover the cost of locating absent class members and of making appropriate payments to them. Any interest accruing after the date of this opinion may be transferred to the foundation. What funds remain undistributed after all possible efforts have been made to locate and substantiate the claims of non-claiming class members may be transferred to the foundation one year from the date hereof.

Second, we note again that the problem of undistributed or surplus funds in class actions and in related contexts is a recurrent one. It should be a high priority of the newly created foundation to explore ways of dealing with this problem while benefiting the maximum number of claimants in these cases.

We believe that the foundation should also include in its purposes consideration of ways to improve competition and to deter or detect and stop anticompetitive activities. It should also include research into the possible forms of notice to class members and the relative effectiveness of different approaches to settlement of complex cases. Finally, we believe that it should include research into the numerous questions that have been raised with respect to the conduct and compensation of counsel in class actions. Subject to these qualifications, we are in agreement with the Administration Committee's proposal. We leave to that body, subject to our approval, the details of forming the foundation and obtaining the proper tax exempt status for it.

Motion to Vacate Awards of Fees and Expenses for Settlement Administration

Finally, we turn to the motion of certain former class members to vacate Administrative Orders that awarded attorneys fees and other fees and expenses associated with the distribution of the settlement fund. The challenged

orders, the dates of which cover the period November 2, 1979 through August 24, 1982, all provide for awards of fees and expenses out of the same reserve fund in which the former class members have asserted an interest. We have concluded, however, that the former [1111] class members, having received and acknowledged full satisfaction of their claims against the settlement, do not have either a legal or an equitable interest in any reserve funds now remaining on account.

It follows from this conclusion that the former class members have no standing to complain that the unclaimed and unexpended residue of the settlement reserve fund is improperly small. The arguments of those former class members who challenge these Administrative Orders are all founded on the incorrect premise that they have been and are now the owners of the reserve fund. *See* Memorandum in Support of Motion to Vacate Certain Administrative Orders at 4; Reply and Memorandum in Support of Motion to Vacate Certain Administrative Orders at 6. As we have found, however, they lack any interest in the reserve fund and cannot contend that they have been injured in fact by our payment out of that fund of fees and expenses incurred by the Administration Committee and others—even if it were the case that the fees and expenses were unreasonable. *Cf. In re Fine Paper Litigation*, 632 F.2d 1081, 1086-87 (3d Cir. 1980) (putative member of a not yet certified class has no standing to object to terms of settlement that do not affect its rights); *and see generally Warth v. Seldon* [sic], 422 U.S. 490, 498-500, 95 S.Ct. 2197, 2204-06, 45 L.Ed.2d 343 (1975).

In any event, it is obvious that the attorneys' fees and expenses authorized by the challenged Administrative Orders were in fact reasonable. The movants correctly point out, as we are well aware, having contributed to their development, that the factors which should guide our discretion in assessing the reasonableness of attorneys' fees have been developed in a long line of authority. In a recent opinion, the Seventh Circuit adverted to eight, possibly

overlapping, factors that are contained in the Code of Professional Responsibility of the American Bar Association:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

Bonner v. Coughlin, 657 F.2d 931, 934 (7th Cir.1981) (quoting DR 2-106); *see also Lindy Brothers v. American Radiator Corp.*, 540 F.2d 102, 113-18 (3d Cir.1976); *Boggess v. Hogan*, 410 F.Supp. 443 (N.D.Ill.1976); *Liebman v. J.W. Petersen Coal & Oil Co.*, 63 F.R.D. 684 (N.D.Ill.1974).

The Administrative Committee's petitions for attorneys' fees incurred in connection with the settlement administration phase of this litigation have been accompanied by contemporaneous time records as well as affidavits listing the hourly rates of the attorneys involved, the time spent and a detailed description of the work. These materials, like all time records filed in connection with attorneys' fees and claims in this litigation, were filed under seal for our review.

We carefully reviewed each of the fee petitions when submitted under the standards outlined above and concluded that each petition was properly substantiated as to hours and normal hourly charges and, as adjusted on occasion, was for a reasonable amount in light of the nature and

quality of the services rendered, the amounts involved and the benefit conferred on the class.

Nor is there any merit to the contention that the expenses or fees awarded for accounting and analytical services as well as for banking services and investment advice were in any way unreasonable, excessive or duplicative. It was clear to us and to the parties from the beginning that [1112] highly competent technical computer and accounting services would be necessary to achieve a fair distribution of the settlement fund. *See* Transcript of September 13, 1979 Proceedings. The services that have been provided have been of a high quality and at a reasonable cost. We have previously outlined in detail the extensive services performed by the various professionals who made the administration of the settlement fund and its distribution so successful.

Finally, we reject the suggestion that the Administrative Orders are subject to challenge because they were entered without notice to the plaintiff class. A previously quoted notice advised all class members that deductions would be made from the settlement fund to cover administrative expenses and attorneys' fees. Opportunity was provided, with proper notice, for objection to any aspects or features of the proposed settlement, including the attorneys' fees and expenses associated with the settlement, and the creation of the reserve fund and its use for late claims and administrative expenses. No objections were lodged either to the adequacy of the procedures or the notice or to the withholding of a reserve to cover payment of late claims and reasonable fees and expenses associated with the settlement distribution.

The notice that these movants allege they should have received is not required either by the Due Process Clause of the United States Constitution or by Fed.R.Civ.P. 23. In the exercise of our discretion to devise adequate notice procedures on the conduct of class action litigation, we determined that additional notice to all class attorneys of each of the Administrative Orders approving, after careful review,

disbursements from the already agreed to reserve fund, in which neither they nor their cleints had any legal or equitable interest, would be both unnecessary and wasteful. *See generally Reynolds v. National Football League, supra,* 584 F.2d at 282, 285; *In re Equity Corp. of America Securities Litigation, supra,* 603 F.2d at 1361.

Conclusion

For the reasons stated above, all motions of former class members whose claims have been paid as well as those of defendants requesting distribution of the reserve fund to them are denied. The Folding Carton Administration Committee is ordered to distribute any interest accruing on the excess reserve funds after the date of this opinion to the Antitrust Development and Research Foundation to be established in accordance with this opinion. The Administration Committee which has so ably handled the fee applications, the investment of the settlement fund, the processing of claims and the distribution of the fund, is to retain the principal of the fund for a period of one year, during which time the Committee will take all possible steps to locate former class members who have not previously filed claims and to assist them in filing proper claims against the fund. One year from the date hereof, the Administration Committee shall distribute any remaining reserve funds to the Foundation.

The motion to vacate certain Administrative Orders awarding fees and expenses incurred in connection with the administration of the settlement fund is likewise denied and the subpoenas duces tecum associated with that motion are quashed.

APPENDIX J

[687 F. Supp. 1223]

In re FOLDING CARTON ANTITRUST LITIGATION.

No. MDL-250

United States District Court,
N.D. Illinois, E.D.

May 24, 1988.

[1224] MEMORANDUM OPINION

WILL, District Judge.

This multi-district case arose out of massive criminal and civil antitrust litigation involving a nationwide price-fixing conspiracy among manufacturers of folding cartons in violation of the Sherman Act, 15 U.S.C. § 1. In September 1979, the parties and the court approved what was then the largest antitrust class action settlement in history. The case is currently before us on two motions of the United States: a motion to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure, and a motion to vacate a second settlement agreement entered into and approved in March 1985. For the reasons stated below, we deny the motions.

I.

The unique facts surrounding the initial settlement agreement and the litigation that preceded it have been exhaustively detailed in *sub nom In re Folding Carton Antitrust Litigation*, 557 F.Supp. 1091 (N.D.Ill.1983), and *In re Folding Carton Antitrust Litigation*, 84 F.R.D. 245 (N.D.Ill. 1979). Accordingly, we will recite only those facts necessary to a determination of the two motions now pending before us.

Over the period of more than a year prior to September 17, 1979, the parties to this action entered into settlement agreements under which various defendant manufacturers of folding cartons agreed to pay approximately $200,000,000 into a settlement fund which was deposited in

an escrow account and invested. We retained jurisdiction in order to supervise the investment of the fund and its distribution.

After approval of the settlement, we appointed a "Folding Carton Administration Committee," ("the Committee") composed of two counsel for the plantiff class, and an independent third counsel. A fourth member, Alexander Domanskis, was added later. The Committee was to review all fee applications and recommend reasonable fees to be allowed the more than fifty plaintiff law firms from coast to coast who had participated under the leadership and direction of the plaintiffs' steering committee in the comprehensive discovery as to liability and damages, an almost infinite number of motions, interlocutory appeals, etc. which were inevitable in the development of the case. After intensive investigation, including a number of hearings, the Committee recommended payment of fees aggregating some $13,000,000, almost $4,000,000 less than requested by the various firms and less than 7 percent of the settlement. We held a hearing on objections to the Committee's recommendations after which we approved the recommended fees. None of the more than fifty firms appealed even though fees of less than 7 percent of the aggregate recovery were the smallest in any major antitrust case to that time.

The Committee had performed so well on the fee claims that we asked its members to handle the plaintiff class members claims and to "report to the Court on the status of any claims filed and submit for the Court's consideration any other proposals for administration and distribution of the funds."

After the filing period was extended several times in 1980, 1981, and 1982, the Committee located and we paid additional late claimants. The Committee, again made intensive reviews and conducted many hearings as to these late claims. On their recommendation, in 1980-82 after further review and hearings, we approved 75 late claims. By 1983, the Committee had processed and we had approved over 2,600 claims totaling approximately $206,000,000. In addition,

more than $13,000,000 in plaintiffs' counsel fees was paid. After deducting the Committee's distribution and administration expenses, approximately $6,000,000 still remained in the reserve fund because of the extremely favorable interest income earned by the fund from 1979 to 1983. We then directed the Committee to explore solutions relating to the disposition of the unclaimed residue of the reserve fund. Pursuant to this directive, the Committee recommended that the remainder of the fund be used to pay any other claimants who might be discovered, even though there had been several previous [1225] extensions of claims filing deadlines and extraordinary efforts had been made to get notice to all possible claimants. The Committee recommended that any funds thereafter remaining be used to establish a non-profit "Antitrust Development and Research Foundation." At that point, six of the more than 2,600 members of the plaintiff class and two settling defendants moved to have any remaning monies distributed to either former class members and/or settling defendants.

After a hearing, we denied these motions on the grounds that neither the plaintiff class members who had previously received some 176% of their single damages with notice that, as provided by the approved settlement agreement, no further amounts would be paid to them nor the defendants who had explicitly relinquished any claim to any residue in the settlement fund had any legal right to the remainder of the reserve fund. We held that, following one last effort to locate and compensate previously non-claiming class members, any reserve funds remaining were to be

> utilized for research into possible techniques for maximizing competition and preventing or detecting and stopping violations of the antitrust laws or other anticompetitive activity.

In re Folding Carton Antitrust Litigation, 557 F.Supp. 1091, 1094 (N.D.Ill.1983).

Thereafter, several members of the plaintiff class and defendants appealed this decision to the Seventh Circuit. On September 5, 1984, the court of appeals in an opinion written by Judge Cummings, affirmed in part and reversed in

part. *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252 (7th Cir.1984). The court of appeals affirmed our holdings (1) that neither the plaintiff class members nor the settling defendants had any remaining legal right to the reserve fund, (2) that heretofore non-claiming class members had the superior equitable claim, and (3) that it was therefore a proper exercise of the district court's equitable discretion to hold the fund open for an additional year to pay late claims and administrative expenses. *Id.* at 1254.

The court of appeals, however, reversed our *cy pres* decision to establish an antitrust research foundation with any unclaimed residue of the reserve fund remaining at the end of the year. The court of appeals called our decision regarding such a research foundation "a miscarriage of justice and an abuse of discretion," 744 F.2d at 1255, and it termed the foundation an "inappropriate waste of money" that amounted to "carrying coals to Newcastle." *Id.* at 1259, 1254. The Seventh Circuit, although approving most of our holding, vacated that portion of our order relating to possibly establishing such a foundation.

Instead of remanding the case for further action consistent with its opinion, the court of appeals then went on to direct that the reserve fund be held open for the one year grace filing period, that during this year the fund be used to pay so-called late, late claiming class members and appropriate expenses, and that thereafter the remainder, if any, "escheat" to the federal government in accordance with its understanding of the "spirit" and "subject to the conditions expressed in 28 U.S.C. §§ 2041 and 2042." *Id.* at 1260, 1256.[1] This was a disposition which none of the parties (plaintiffs or defendants) had requested or desired, on which there had been no hearing and no opportunity to object and

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[1] 28 U.S.C. § 2041 provides:

> All moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the Treasurer of the United States or a designated depositary, in the name and to the credit of such court.

(footnote continued on next page)

which the court of appeals had given no indication it [1226] was even contemplating prior to its decision.

In light of three subsequent statements by the Seventh Circuit, the "escheat" directive was to prove a source of confusion over the import of the appeals court decision. The first of these statements was the Seventh Circuit's acknowledgement that "the open-ended closing sentence" of § 2042 would allow " 'Any claimant entitled' thereto to recover from the United States after the escheat." *Id.* at 1255. The opinion noted secondly that, as a practical matter, it was "doubtful" that any non-claiming class members would probably ever present themselves. *Id.* Finally, in order to avoid what "would probably constitute an advisory opinion," the Seventh Circuit declined to say whether, under its approach, the government had actually obtained "title" to any money which might remain in the fund a year or more hence after the late, late claims were paid. *Id.* at 1260.[2]

The Seventh Circuit's decision thus appeared to project a possible federal interest in the reserve fund without either holding that the government had any present interest in the fund or making the government a party-plaintiff in the multi-district litigation. The appeal court's application of sections 2041 and 2042 did not and could not create a true escheat to the federal government for several reasons: first, the court determined that the language of section 2042 would permit legitimate future claimants to be paid their rightful claims (although, the opinion also seemed to suggest

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Section 2042 provides in relevant part:

> In every case in which the right to withdraw money deposited in court . . . has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, such court shall cause such money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to such money may, on petition to the court and upon notice to the United States Attorney and full proof of the right thereto, obtain an order directing payment to him.

[2] Judge Flaum dissented in part from the court's ruling on the ground that that there was no such concept as "federal escheat." *Id.* at 1256.

that after the expiration of one year, no class members (early or late) would be entitled to be claimants under § 2042); second, the court's refusal to issue an advisory opinion on the government's title to any unclaimed funds; and third, the fact that §§ 2041 and 2042 do not provide for escheat to the federal government but only for holding the funds in the Treasury for the benefit of possible future claimants. Thus, the upshot of the Seventh Circuit's holding was that, if after one year any unclaimed funds should remain, they would be permanently available in the United States Treasury for any rightful owners who might appear.

Following the Seventh Circuit's decision, the parties filed petitions for rehearing; the court of appeals denied these petitions on October 18, 1984 without clarifying the difficulties regarding any possible future unclaimed funds.

Thereafter, on December 17, 1984, Thomas J. Boodell, a member of the Committee, telephoned Gregory C. Jones, who was at that time First Assistant U.S. Attorney in Chicago.[3] Boodell advised Jones of the government's possible future custodial interest in the reserve fund and of the Committee's desire to discuss a possible resolution of the litigation. The following day, Boodell sent a letter to Jones confirming their earlier phone conversation; Boodell also provided Jones with copies of both the district court's and the court of appeals' opinions in the case.

Following the Seventh Circuit's denial of the petition for rehearing, various petitions were filed with the Seventh Circuit and the Supreme Court. On January 8, 1985, Judges Robson and Will filed a petition for an original writ of mandamus with the United States Supreme Court or in the alternative, for a writ of certiorari.[4] Service [1227] of the

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[3] Jones, subsequently on February 1, 1985, upon Dan Webb's resignation, was appointed the Acting United States Attorney and served in that capacity through April 28, 1985.

[4] In the mandamus petition, the Judges sought to have the Supreme Court direct the Seventh Circuit to (1) vacate that part of their September 5, 1984 judgment which ordered that any amounts remaining in the Folding Carton Antitrust Litigation class action reserve fund, after

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petition was made on Judges Cummings, Eschbach, and Flaum, and also on Dan Webb, who was then the United States Attorney for the Northern District of Illinois. Several weeks later, certain former plaintiff class members also filed with the Supreme Court their own petitions for certiorari, and two defendants filed with the Court a short response to all of the pending petitions. Subsequently, the former class members sought and were granted by the Supreme Court an extension of time to file responses to the Judges' petition on the grounds that they had been busy preparing their own petition and that settlement negotiations were underway. The various petitions received a substantial amount of publicity with articles appearing in both the *Chicago Tribune* on January 15, 1985, and the *National Law Journal* on February 4, 1985.

In February 1985, Thomas Boodell again called Gregory Jones, then the Acting U.S. Attorney, to inform him that certain parties in the litigation were discussing a stipulated settlement which might affect the government's possible future interest in the fund. Boodell advised Jones that the U.S. Attorney's Office would be given notice and an opportunity to object to the proposed settlement in the event a stipulated settlement order was submitted to the court for its approval. At about this time, Lowell Sachnoff, an attorney for the Folding Carton plaintiff class, made a similar call to James T. Hynes, Chief of the Civil Division of the U.S. Attorney's office. Sachnoff also sent the U.S. Attorney's office a copy of the proposed stipulated order of settlement which the parties were to present to the court for approval at a hearing scheduled for March 21, 1985.

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the payment of late claims and administrative expenses, "escheat" to the United States; and (2) remand the issue of how the residue of the reserve fund should ultimately be distributed.

In the alternative, the Judges requested the issuance of a writ of certiorari to the Seventh Circuit to review the judgment entered September 5, 1984, and requested the Supreme Court to reverse the disposition made there of the reserve fund and to remand the issue to the district court.

At the March 21st hearing, neither Hynes, nor Gregory Jones, nor anyone else from the U.S. Attorney's office appeared. After noting the government's absence, we inquired first, whether the government had been notified of the hearing, and second, what position the government was taking on the proposed stipulated settlement order. Mr. Sachnoff responded that the government had been notified of the hearing and that he would again contact the U.S. Attorney's office to discuss the proposed settlement. We said that we would not consider the settlement which we did not favor unless the government's position was clear. We then continued the hearing until March 27, 1985.

Thereafter, on March 26, 1985, Mr. Sachnoff met Mr. Hynes in the latter's office. They discussed the proposed stipulated order of settlement, the government's position with regard to the fund, and the hearing that was to take place the following day to allow those who might be affected by the proposed order to express their views. During this meeting, Mr. Hynes reportedly told Mr. Sachnoff that the government had received notice of the stipul[illegible]d order of settlement, that the government had thoroughl[illegible] considered the matter and would not object to the proposed settlement order. Finally, Hynes said that neither he nor anyone else from the U.S. Attorney's office would appear at the March 27, 1985 hearing.[5]

At the March 27th hearing, no representative from the U.S. Attorney's office appeared. Mr. Sachnoff reported to the court the gist of his conversation with Mr. Hynes the day before. Specifically, Sachnoff reported that Hynes had told him that the government had no objection to the proposed settlement and would not appear. The following day, March 28, 1985, we reluctantly entered the stipulated order of settlement which provided, *inter alia*, that the remaining funds would be paid to late claimants and to the Committee

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[5] *See* Lowell Sachnoff's letter to Thomas Boodell dated April 5, 1985 and attached memo of his meeting with James Hynes, Chief of the Civil Division of the U.S. Attorney's Office in Chicago, Appendix of Exhibits to Response by Folding Carton Administration Committee to United States Motion to Intervene and Vacate Settlement, # 10.

for the costs of administration and attorneys' fees, that half of any funds remaining would be distributed *pro rata* to previously paid claimants, and that the other half would be paid to two or more Chicago law schools to fund research projects in the area of class actions, and particularly antitrust law. [1228] Upon entry of that order, and with the agreement of all parties, all pending petitions in the Supreme Court were dismissed by stipulation and Judges Robson and Will withdrew their certiorari and mandamus petitions.

After we entered the settlement order, notices to non-claiming class members were published. Thereafter certain late claims were filed. The Committee reviewed the late claims, held hearings, and on March 30, 1986, filed recommendations with the court. The court held hearings and entered orders approving payment of these late claims on September 29, 1986.

After we approved on September 29, 1986, the payment of some $3,132,000 in additional late claims to 82 so-called late, late claimants and after the payment of costs and attorneys' fees incurred in connection with the earlier appeal and in processing the late claims, approximately $3.6 million dollars remained in the reserve fund. Pursuant to the terms of the settlement agreement, the fund was then divided into two equal parts: one part was distributed *pro rata* to all class members, including late claimants, who had previously received payments on their claims, some 2,700 individual payees. The other part was to be held for distribution to local law schools which were to submit applications for grants from the fund.

Following notification of the available funds, all six Chicago law schools submitted applications for grants. We reviewed the proposals and subsequently entered two orders directing that funds be paid to two law schools: a $1.2 million grant to Loyola University; and a $156,000 grant to the University of Chicago. The grant to Loyola was to establish a Center for Antitrust Law in the Public Interest, to study the working of our private enterprise economy and the role, if any, which antitrust law should play in maximizing competition in the public interest. The grant to the University of

Chicago was to enable a study to be made under the direction of the country's foremost expert on the American jury, Professor Hans Zeisel, of the performance of juries in complex, including antitrust, cases. The grant to Loyola was paid and the funds deposited in a University Special Account. Implementation of the two funded proposals was stayed, however, due to a *qui tam* complaint filed in this district on February 11, 1987, for damages under the False Claims Act, 31 U.S.C. § 3729 ("the Act"). The complaint was filed against the Committee, its members, their respective law firms, certain other law firms, and the various counsel who signed the settlement order which we approved on March 28, 1985. *United States Government, ex. rel., Paul Houck v. Folding Carton Administration Committee, et al.*, No. 87 C 1253.

The complaint was filed by Paul Houck, an individual who had represented late claimants in recovering money from the settlement fund during the course of the litigation. As the statute provides, he brought the action solely on behalf of the government and not individually or as a representative of any identified class of claimants but sought compensation for his services under § 3730(d) of the False Claims Act. The gist of Houck's complaint was that the Committee and its individual members as well as the individuals and entities to whom money was distributed knew that the Seventh Circuit's opinion prohibited the distribution of the fund in the manner set forth in the settlement agreement, and that they nevertheless proceeded to distribute the funds in disregard of the Seventh Circuit's mandate. Houck further alleged that the parties had misrepresented to the court that the government had waived its objections to the settlement order. The complaint was held under seal for 60 days pursuant to § 3730(b) of the Act to allow the government to decide whether or not it wished to intervene and prosecute the case. After obtaining an extension of the 60 day period, the government, on May 12, 1987, advised

that it would not intervene in the *Houck* case. That case was dismissed by Judge Norgle on January 20, 1988.[6]

[1229] On July 9, 1987, two months after advising it would not intervene in the *Houck* case, the government filed the instant motions to intervene in MDL 250 and to vacate the settlement agreement. The government now alleges that (1) the March 28, 1985 settlement order was contrary to the law of the case as set forth in the Seventh Circuit's opinion, (2) the government never technically consented to the settlement order, and (3) the instant motions were timely because the government acted promptly once it became aware of the reserve fund's actual distribution. Specifically, as to the settlement itself, the government now seeks to unscramble the previous distribution in order to recover the additional monies paid to both original and late claimants (totalling $2,313,621.09), the grants paid or designated to the two local law schools (totalling $1,356,000), attorneys' fees incurred in the formulation and execution of the settlement, and whatever remains in the reserve fund.

II.

A. Motion to Intervene

We first consider the government's motion to intervene as a matter of right under Fed.R.Civ.Pro 24(a).[7] Rule 24(a)

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[6] After the filing of the *qui tam* complaint, the United States moved to stay the March 12, 1987 order approving the transfer of $1,200,000 from the reserve fund to Loyola which had already taken place. The motion was continued several times until the government declined to intervene in the *Houck* case. The government then, on July 9, 1987, filed the current motions in this court. On January 20, 1988, Judge Norgle granted the Committee's motion to dismiss the *Houck* case due to a lack of subject matter jurisdiction. *United States Government ex rel. Paul Houck v. Folding Carton Administration Committee, et al.*, 87 C 1253 (Jan. 20, 1988, Norgle, J.) [available on WESTLAW, 1988 WL 74829]. Houck has appealed Judge Norgle's ruling to the Seventh Circuit.

[7] Fed.R.Civ.Pro. 24 states in relevant part:

(A) Intervention as of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of

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requires that an application for intervention be "timely." Because Rule 24 leaves the timeliness criterion undefined, courts have interpreted it to require consideration of "all the circumstances" surrounding the intervention:

> Whether intervention be claimed of right or as permissive, it is at once apparent from the initial words of both Rule 24(a) and Rule 24(b), that the application must be 'timely.' If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

NAACP v. New York, 413 U.S. 345, 364, 93 S.Ct. 2591, 2602, 37 L.Ed.2d 648 (1973). In this circuit, among the factors a trial court must consider in determining the timeliness of a motion to intervene are: (1) the length of time the intervenor knew or should have known of its interest in the case; (2) the extent of prejudice to the original litigating parties from the intervenor's delay; (3) the extent of prejudice to the would-be intervenor if the motion is denied; and (4) any unusual circumstances. *United States v. Kemper Money Market Fund, Inc.*, 704 F.2d 389, 391 (7th Cir. 1983); *City of Bloomington, Indiana v. Westinghouse Electric Corp.*, 824 F.2d 531, 534 (7th Cir. 1987).

We begin by addressing the first factor: the length of time the intervenor knew or reasonably should have known of its interest before petitioning to intervene. On this point, the

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the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

record is clear that as early as December 1984, the government was notified of its possible custodial or fiduciary interest in the fund, and that, following several additional notifications, [1230] the government specifically declined to act to intervene or otherwise act to protect any interest it might have. In an attempt to explain why it chose to remain silent during the four months preceding the entry of the settlement order (although on notice as to its terms and the date the court would hear objections to it) and for the 24 months thereafter (during which the settlement agreement was substantially carried out), the government offers the following reasons why the court should not find its petition tardy: (1) that intervention by the United States did not become "ripe" until the amount of money remaining in the reserve fund became "determinate"; (2) that until Paul Houck filed the February 11, 1987 *qui tam* complaint the government was unaware that money remained in the reserve fund; and (3) that within two days of the district court's order transferring $1.2 million dollars from the reserve fund to Loyola, the government notified the court as to its intentions to recover the fund.

We see little merit in any of the government's contentions. To begin with, the record amply demonstrates that the government knew long before Houck's complaint and the grant to Loyola of its possible interest in the fund and that the settlement would eliminate that interest. Indeed, the government itself does not dispute that on no fewer than seven occasions commencing in 1984, before the court approved the stipulated order of settlement, the United States Attorney's office received by letter, telephone, official notice, and face-to-face discussions, actual notice of its possible interest in the reserve fund and that it would be eliminated by the settlement agreement.[8]

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[8] The first notification received by the U.S. Attorney's office occurred on December 17, 1984, when Thomas Boodell telephoned First Assistant U.S. Attorney Gregory Jones to inform him of the Seventh Circuit's opinion and of the possible interest of the government created by the decision. The following day, Mr. Boodell again notified the government

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Second, the fact that the government could not have known in December 1984 the precise amount of unclaimed residue which would ultimately remain in the fund is irrelevant to a determination of whether the government knew of its possible interest in the first instance. The court of appeals decision made the existence of the government's possible interest obvious, and members of the Committee and others brought this fact directly to the attention of the U.S. Attorney's office. At that stage, the only remaining question about the government's interest was a question of degree, not of kind.

Accordingly, we conclude that the timeliness clock began to run on December 17, 1984—the date the government received actual notice of its possible interest in the case and of the parties' desire to discuss it—for it was at this point the government knew that intervention might be necessary to protect *whatever* interests, custodial or beneficial, it might

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of its interest in the litigation, this time by letter. The government received yet a third notice on January 7, 1985, when the U.S. Attorney himself was served with a copy of the original petition for a writ of mandamus.

The fourth and fifth notifications occurred in February 1985 when both the First Assistant to the U.S. Attorney as well as the Chief of the Civil Division, James T. Hynes, received personal telephone calls advising them, first, of the tentative proposed settlement, and second, of the hearing scheduled before Judge Will on March 21, 1985, to allow interested parties to raise any objections to the proposed settlement. The sixth notification occurred when a notice of a proposed stipulated settlement order was served on James Hynes. Finally, the seventh notice came in the meeting between Mr. Sachnoff and Mr. Hynes on March 26, 1985, at which the two discussed the proposed settlement order.

Additionally, the January 15, 1985 *Chicago Tribune* "On the Law" column and the February 4, 1985 article in the *National Law Journal* on the actions of the various parties following the Seventh Circuit's decision reasonably should have put the United States on notice as to its interest in the litigation. *See Culbreath v. Dukakis*, 630 F.2d 15, 20-21 (1st Cir. 1980); *NAACP v. New York, supra*, 413 U.S. at 366, 93 S.Ct. at 2603.

have in the fund.[9] Moreover, even if the government is not [1231] deemed to have been put on notice in December 1984, it certainly was on notice in March 1985, when it received a copy of the settlement agreement which provided for the distribution of the entire reserve fund with none of it to be deposited in the United States Treasury. It also received notice of the March 27, 1985 hearing at which objections to the settlement agreement would be heard. Yet it did not file the pending motions until July 9, 1987, some 28 months later. Thus, an examination of the initial factor, the length of time the prospective intervenor knew or reasonably should have known of its interest before it petitioned to intervene (in this case, at the very least 28 months), weighs heavily against the government.

In this connection, while not material, the government's contention that it notified the court of its intention to recover the Loyola grant within two days of our approving it is factually inaccurate. We approved the grant on March 12, 1987. On several occasions thereafter, government counsel reported that consideration was being given as to what action, if any, the government would take. When, on May 12, 1987, they advised the court that the government had decided not to intervene in the Houck *qui tam* proceedings, government counsel also stated that no determination had been made as to whether or not the government would take any further action. It was not until July 9, 1987, four months after the grant, when the pending motions were filed, that the court was first aware of the government's position.

The second and third factors we must consider are (a) the extent of prejudice to the original litigating parties as a result of the would-be intervenor's failure to intervene as soon as the intervenor knew or reasonably should have known of its possible interest in the suit, and (b) the extent of prejudice to

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[9] Perhaps even the December 17, 1984 date is overly generous. One could argue that the timeliness clock began to run on September 5, 1984, the date of the Seventh Circuit's decision creating the potential interest. *See Culbreath v. Dukakis*, 630 F.2d 15, 21 (1st Cir.1980); *Garrity v. Gallen*, 697 F.2d 452, 456 (1st Cir.1983).

the would-be intervenor if its motion is denied. We first consider the question of prejudice to existing parties.

That the original litigating parties will be substantially harmed if the government is permitted to intervene at this late date is obvious. In March 1985, various petitions for mandamus or certiorari were pending before the Supreme Court including those by Judges Robson and Will. While these were pending, the parties presented a proposed settlement agreement. All of the parties of record to the dispute—late claimants, previously paid claimants, and defendants agreed to the proposed settlement. In addition, the previously paid claimants agreed to withdraw their petitions for certiorari. At that time, we stated that before we would approve the settlement, we would have to know the government's position on the matter and requested that the United States be advised directly of the proposed settlement. Mr. Sachnoff then had a face-to-face meeting with Mr. Hynes, the Chief of the Civil Division of the U.S. Attorney's Office in Chicago. Mr. Hynes specifically stated that the government would not object to the proposed settlement and would not appear at the March 27th hearing at which objections were to be heard. When the United States neither appeared at the March 27, 1985 hearing to object nor filed objections or a motion to intervene in the case, and when Mr. Sachnoff reported to the court the particulars of his discussion with Mr. Hynes, we approved the stipulated settlement order.

At that March 27th hearing, we indicated that we would have preferred to proceed in the United States Supreme Court on our mandamus and certiorari petitions. In view of the agreement of all the parties of record and the fact that the government had no objection to the entry of the settlement order, we agreed to approve the settlement and withdraw the mandamus and certiorari petitions in the interest of disposing of the remaining controversies in the case. Had there been any indication that the government or any of the parties of record had any objection to the settlement, we would not have withdrawn the pending petitions in the Supreme Court and we assume the plaintiff class members

would not have withdrawn theirs. After approving the settlement agreed to by all the parties, we instructed the Committee to implement the settlement, a task which was substantially accomplished over the next two years with no objection from the government.

[1232] Given this course of events, we perceive substantial prejudice to the original parties if the government is permitted to intervene at this exceptionally late stage. *See Garrity v. Gallen*, 697 F.2d 452, 455 (1st Cir. 1983) ("The timeliness requirement was not designed to penalize prospective intervenors for failing to act promptly; rather, it insures that existing parties to the litigation are not prejudiced by the failure of would-be intervenors to act in a timely fashion."). Had the government chosen to intervene at any time prior to our approval of the settlement agreement and before the petitions pending in the Supreme Court were dismissed, which was long after it had notice of a possible interest and therefore had a right and a duty to do so, events might have turned out quite differently. But at this point, some three and one half years have elapsed, during which any opportunity to present the matter to the Supreme Court has been lost and considerable time and effort has been spent in implementing the settlement agreement which is almost completely carried out. Late claimants have been paid, some 2,700 class members have received supplemental payments, and the bulk of the remaining funds have been allocated to two law schools with the remainder to be distributed once these motions are finally disposed of.

For these reasons, attempting now to unscramble the distributions that have already taken place would be an almost impossible task and would be manifestly unfair to the original parties who relied and acted on the decisions the government made back in March 1985. *See Chase Manhattan Bank v. Corporacion Hotelera de Puerto Rico*, 516 F.2d 1047 (1st Cir.1975) (holding motion to intervene untimely where a municipality sought to intervene in a case two and one half months after judgment to assert a tax lien which would have resulted in an unscrambling of the judgment distribution);

Chemical Bank New York Trust Co. v. Steamship Westhampton, 268 F.Supp. 169, 172-73 & n. 10 (D.Md. 1967) (holding motion to intervene untimely where the United States sought to assert a claim for forfeiture against the proceeds from the forced sale of a vessel after three years of proceedings in which the government although asked, repeatedly elected not to take a position).

Yet unscrambling the earlier distribution is precisely the relief the government here seeks. Such a task would be monumental and would render worthless the hundreds of hours of effort by claimants' attorneys, accountants, the law schools, the Administration Committee and the court which were necessary to carry out the terms of the settlement. We alone spent countless hours reviewing the six law schools' grant applications, consulting with members of the Administration Committee, deans and other representatives of the various law schools, outside experts, etc., in determining which grants should be made. The Loyola application, for example, was revised several times after extended discussions not only with representatives of that law school but antitrust scholars throughout the country. It was finally approved many months after its original presentation after we were satisfied that, in its revised form it could make a significant contribution to the study of the U.S. economy and the maximization of competition for the public benefit.

While the University of Chicago application was less complex, it too involved considerable time and effort to put into its final form. Meanwhile, there are still pending the applications of the other four law schools which were in process of consideration and possible revision and approval on July 9, 1987 when the government filed the pending motions.

At the very least, vacation of the settlement agreement would require an attempt to recover (1) over $2,000,000 paid to almost 2,700 class members nationwide, (2) the $1,356,000 distributed and/or designated to area law schools, and (3) the various attorneys' fees, accountants' fees

and other expenses incurred in the formulation and execution of the settlement agreement.

The impossibility of such a project is obvious. Many of the class member payees are undoubtedly no longer in existence. For example, a number were trustees in bankruptcy who filed claims on behalf [1233] of debtor corporations. The amounts paid to them were then used either to pay bankruptcy administration costs or were distributed to creditors. Other payees expended the funds in various ways, by, for example, purchasing equipment, paying salaries, or paying debts and/or dividends. Funds paid to attorneys, accountants and others for their services in implementing the settlement agreement will be equally impossible to recover.

Balanced against the prejudice to the foregoing is the harm the would-be intervenor will suffer if intervention is not permitted. Though the government's brief is suprisingly silent on the question of prejudice, we believe that the government has shown at best nothing more than that it will suffer the *possibility* of insubstantial prejudice. Under the language of 28 U.S.C. §§ 2041 and 2042, the government receives unclaimed funds on deposit and holds them for possible future claimants.

Interestingly, the Seventh Circuit apparently did not consider the fact that the funds here involved have not and had not in 1984 been deposited unclaimed for more than five years by the person or persons entitled to them as § 2042 requires. In fact, claims were being made and paid as late as September 1986, two years after the court of appeals decision. Technically, therefore, the statutory sections in question were not and are not even now applicable. Moreover, as Judge Flaum's dissenting and concurring opinion pointed out, there is no statutory or common law basis for escheat to the federal government. Unclaimed funds generally (i.e., bank deposits, trust funds and the like) can only escheat to the appropriate state government. The federal government's possible prejudice as prospective custodian if the settlement agreement is completed will clearly be much less than the

prejudice to the parties and others entitled to receive funds under the settlement if the government is permitted to interevene.

Taken in its best light, therefore, the government's case for intervention is clearly not superior to the case against it. Where applicants can show "no more than that they will suffer the possibility of prejudice if intervention is denied; ... the balance of prejudice tips in favor of the [existing parties]. *Garrity v. Gallen*, 697 F.2d 452, 458 (1st Cir.1983). For this reason, we conclude that any possible prejudice to the government does not outweigh the substantial prejudice the existing parties will suffer if the government is permitted to intervene.

The final element in our determination of whether the government's motion to intervene is timely is whether there are "any unusual circumstances" which should be considered. *Kemper Money Market Fund, supra*, 704 F.2d at 391. "For example, if the would-be intervenor who failed to apply for intervention promptly after he became aware of his interest in the case could advance a convincing justification for his tardiness, such that for reasons other than lack of knowledge he was unable to intervene sooner, this would militate in favor of a finding that his petition was timely." *Bloomington, supra*, 824 F.2d at 537, quoting, *Stallworth v. Monsanto Co.*, 558 F.2d 257, 266 (5th Cir.1977).

Here, the government alleges that the unusual circumstance supporting its motion to intervene is that, if denied, "it is unlikely that the Seventh Circuit will ever have the opportunity to review the important issue of the propriety of the settlement agreement in light of its 1984 decision." Given the facts of this case, however, this explanation is hardly adequate. In our system, whether any court decides any question depends on whether the question is brought by a proper party. And the propriety of a party can neither be determined by the importance of the question or by the desirability of an answer by a particular court.

Moreover, a similar or comparable "unusual circumstance" exists in every intervention motion. If the party

seeking to intervene is denied entry, no court, trial or appellate, will have the opportunity to pass on its contentions. This does not excuse otherwise inexcusable delay. Rather, what the government needs here is a set of special circumstances explaining its failure to act in a timely fashion. The government's [1234] desire for a ruling by the Seventh Circuit has nothing whatever to do with "a convincing justification of tardiness." *Bloomington, supra*, 824 F.2d at 537. The Seventh Circuit's opinion was issued on September 5, 1984. The government, as a non party but one having a possible interest in the case as a result of that decision, was repeatedly notified thereafter of that possible interest as well as of the proposed settlement. Armed with this knowledge, it nevertheless specifically declined to take any steps to assert whatever interests it may have had. The only "unusual circumstance" presented by this scenerio is the fact that the government specifically declined to intervene in this case and affirmatively indicated that it had no objection to the settlement, and then two and one half years after the settlement order was entered and substantially carried out decided to file this motion. *See Western Shoshone Legal Defense and Education Ass'n v. United States*, 531 F.2d 495, 503, 209 Ct.Cl. 43 (1976) ("the law is developing a critical eye toward persons, who knowing that a pending action is designed to stabilize legal relationships that concern them, deliberately stay out of that litigation although they could easily enter it."); *United States v. Blue Chip Stamp Co.*, 272 F.Supp. 432, 436 (C.D.Cal.1967).

To sum up: In view of the fact that (1) the government failed to seek to intervene in this action until two and one half years after it was put on notice both of its possible interest and that the proposed settlement order would negate any such interest, (2) the parties of record and other beneficiaries of the settlement will be substantially prejudiced if the government is now permitted to intervene, (3) the government will suffer little prejudice, if any, if intervention is not permitted here, and (4) the extended

failure to intervene is explained by no unusual circumstances, we conclude the government's motion to intervene is untimely and must be denied.

III.

B. Motion to Vacate the Settlement Agreement

Having found the motion to intervene untimely under Rule 24, we could avoid consideration of the substance of the government's motion to vacate the settlement. In an effort to resolve all of the issues in this protracted case, however, we will move to a discussion of the merits.

The government claims its motion to vacate is proper under Fed.R.Civ.P. 60(b) because the district court abused its discretion by approving a settlement agreement that "violated the law of the case." *See In re Sanford Fork and Tool Co.*, 160 U.S. 247, 255, 16 S.Ct. 291, 293, 40 L.Ed. 414 (1895) ("The [lower] court is bound by the decree as the law of the case; and must carry it into execution according to the mandate.").

Specifically, the government alleges that the settlement entered into by all parties of record and approved by us violated the Seventh Circuit's mandate (1) by allowing payment of additional funds to previously paid class members when the court of appeals had held that the plaintiff class had no rights in the reserve fund, and (2) by allowing payments to law schools for the study of antitrust law when the court of appeals had held such action to be "a miscarriage of justice and an abuse of discretion." The government further argues that (1) once the Seventh Circuit's mandate issued, the parties and the court were unalterably bound by it even insofar as any settlement was concerned, and (2) the fact that various petitions were pending in the Seventh Circuit and in the Supreme Court is irrelevant to the question of whether the parties were in fact bound by the Seventh Circuit's decision.

The question of whether the settlement violated the law of the case is easily answered: The settlement agreement did not violate the Seventh Circuit's mandate (1) because that

mandate was not final at the time of the settlement, and (2) in any event, governed only the equitable rulings of this court. The distinction here is one between a substantive exercise of judicial power and a settlement among parties to a suit. While the appeal concerned the district court's *discretion to order* the disposition [1235] of the residual fund, the question before us in March of 1985 involved only the validity of the *parties' agreement* as to the disposition of the fund. In considering and approving the terms of the stipulated settlement agreement between the parties, a district court is not constrained by the law of the case. *See Holcomb v. United States*, 622 F.2d 937, 940 (7th Cir.1980) ("while an appellate decision establishes the 'law of the case' for all subsequent stages of the litigation ... the trial court is restrained only with respect to those issues which have been considered and resolved by the appellate court.") This obviously does not include a settlement never considered by the appellate court. Cases are frequently settled after an appeal on terms different from the appellate court's ruling. The parties are not bound to limit any settlement by the appellate court's holding and many cases are settled on terms other than the appellate court's determination, e.g., to obviate further appeals (as to the Supreme Court), or to expedite payment of damages by acceptance of a lesser amount than that mandated by the appellate court. Similarly, of course, cases are frequently settled after a trial court's judgment on terms other than those determined by the trial court, again to obviate appeals and to expedite disposition of the case.

Because the issues here were not the same, the government's reliance on *Schwartz v. NMS Industries, Inc.*, 575 F.2d 553 (5th Cir.1978) and *White v. Murtha*, 377 F.2d 428 (5th Cir.1967), is misplaced. In those cases, in contrast to this case, the respective trial judges violated the law of the case by reinterpreting the appellate courts' rulings on remand. For example, in *Schwartz*, the Fifth Circuit upheld a district court's finding that a stock issuer had breached its contract with the plaintiff stockholders; however, the appellate court determined that on remand, the district court was

to reduce the plaintiffs' original award by first calculating and then deducting the market value of the nonregistered stock they could have sold. Subsequently, the appellate court found that the district court had violated the law of the case by holding on remand that the potential return on the sale of the unregistered stock ought not to mitigate damages. But in this case, the Seventh Circuit never had before it the question of the propriety of the settlement agreement. Nor had the case been remanded at the time the parties agreed to settle, for petitions for mandamus and certiorari were then pending in the Supreme Court. Thus, we could not violate the Seventh Circuit's mandate by approving the stipulated order of settlement under which the parties, in light of and in reliance upon the government's decision not to participate in the litigation, gave up their rights to pursue review of the Seventh Circuit's decision in the Supreme Court.

Moreover, as the Fifth Circuit has noted " 'the law of the case' rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that 'there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate on chances from changes in its members.' " *White v. Murtha, supra*, 377 F.2d at 431. Settlements achieve the same policy goals as the law of the case doctrine; that is, an end to litigation. And in this case, that was precisely the effect of the stipulated settlement agreement: in return for the settlement, the parties to the litigation moved to dismiss their mandamus and certiorari petitions before the Seventh Circuit and the Supreme Court thereby, they believed, bringing this protracted case to a close.

Even if the issues were the same, however, the law of the case doctrine is inapplicable here because the Seventh Circuit's decision lacked finality. As is clear from the record, following the Seventh Circuit's decision, the plaintiff class, and Judges Robson and Will, all sought review in the Supreme Court. Subsequent to the filing of these various petitions but before any action was taken on them, the parties to the litigation reached a settlement of the matter.

Following the government's decision neither to participate in the litigation nor to object to the settlement, we merely [1236] approved the parties [sic] stipulated order of settlement. Upon entry of that order, and with the agreement of all the parties, all certiorari petitions pending before the Supreme Court were dismissed and the mandamus petition was withdrawn.

As the preceding chronology demonstrates, the Seventh Circuit's decision lacked finality because at the time the settlement occurred, challenges to that decision were pending before the Supreme Court. Those challenges brought with them the possibility of a reversal or modification of that earlier order. And so long as the parties were awaiting action by the Supreme Court on their petitions, the Seventh Circuit's decision was not final and could not constitute an impediment to settlement. *See Airline Stewards and Stewardesses Association v. Trans World Airlines*, 630 F.2d 1164, 1167-1169 (7th Cir.1980).

Moreover, settlements have long been favored and our approval of a settlement accepted by all the parties and not objected to by any non-party was almost perfunctory and inevitable. Having secured the consent of the government, the parties could have agreed to any settlement they chose without seeking *any* court's approval. We indicated at the time that we would have preferred to have the case considered by the Supreme Court since it involved fundamental questions of the relationship between trial and appellate courts. As we said in our petition to the Supreme Court, we believed that the Seventh Circuit's order disposing of as yet unknown funds, by a disposition which none of the parties had requested or wanted, without notice of its intention to do so, and without a hearing or opportunity to object, rather than remanding the case for future appropriate action at such time as there were funds to distribute was an abuse of appellate discretion and jurisdiction.

Of even greater importance, we believed then and continue to believe that application of § 2042 to any undistributed funds in a class action is probably error. In virtually

every class action, funds remain after the final distribution to class members and the payment of all expenses. Frequently, the amount is insufficient to make a further distribution to class members economically warranted. On other occasions, as here, it results from extraordinary interest income earned on a deposited settlement fund or lower late claims and expenses than estimated.

In every such instance of which we are aware prior to this case, the court responsible for the class action has applied the *cy pres* doctrine and distributed the residue to law schools, bar foundations, public interest law agencies or similar educational or charitable organizations. To the best of our knowledge, § 2042 has never before been held applicable to such funds. As previously pointed out herein, the statute requires that they be held undistributed and unclaimed for a substantial period (5 years or more). In every class action case, the funds have been fully distributed including the *cy pres* distribution long before the statutory precondition period has run as it has not in this case.

The court of appeals holding here would effectively eliminate the *cy pres* doctrine in class actions. This would be a major change in the historical and traditional handling of such cases. Through the years, we alone, for example, have distributed residual class action settlement funds in three different class actions assigned to us to such organizations as the Chicago Bar Foundation, the Lawyers Committee for Civil Rights, etc. Other judges throughout the country have done likewise.

We believed that the question of whether the *cy pres* doctrine or § 2042 governed the distribution of residual funds in class actions, was one the United States Supreme Court should ultimately answer. In any event, we believed it inappropriate for the court of appeals *sua sponte* to do so without a hearing on the question or an opportunity for any of the parties to object or point out the relevant considerations applicable to such a major change in the long-established procedure. Accordingly, we filed our petition for an original writ of mandamus or, in the alternative, for a writ of

certiorari seeking to have the case remanded [1237] to us for a determination of the appropriate disposition of any residue at such future time (it turned out to be two years later), as the amount of the residue, if any, could be determined.

In the course of making such a determination, we would have heard arguments and received briefs as to which principle, *cy pres* or § 2042 governed. The court of appeals then could have reviewed our decision after further briefing and argument on the question. If necessary, the Supreme Court could then have reviewed the court of appeals decision. It is possible, of course, that, after full consideration, we would have concluded that § 2042 controlled. It is also possible that, after similar consideration, the court of appeals might have concluded that the *cy pres* doctrine and not § 2042 was the governing principle. Whatever the court of appeals decided, its decision would have been made after an opportunity for careful consideration of the merits of the alternatives and not *sua sponte* as was done here. Unfortunately, we never had the opportunity to raise these questions with the Supreme Court. The parties advised us that they had agreed upon a settlement to which the government had no objection and we had no realistic alternative but to approve the agreed settlement and withdraw our petition to the Supreme Court. Accordingly, we reluctantly approved it.

To vitiate the contention that the record parties' settlement agreement was not constrained by the law of the case, the government argues that, in effect, it never validly consented to the settlement. Thus, the government contends that although a representative from the U.S. Attorney's office purported to consent to the settlement agreement in 1985, that consent was "meaningless" and a "nullity" because in 1985 individual U.S. Attorneys only had the authority to institute and/or settle claims in cases not exceeding $100,000. To support this contention, the government points to the following Department of Justice regulations, which, it claims, demonstrate that only the Deputy Attorney General had the authority to decide whether to intervene or, alternatively, to agree not to object to the stipulated settlement order.

> . . . [t]he Assistant Attorneys General of the litigating divisions are authorized, with respect to matters assigned to their divisions, to: (1) accept offers in compromise of claims on behalf of the United States in all cases in which the difference between the gross amount of the original claims and the proposed settlement does not exceed $750,000 or 10% of the original claims, whichever is greater. 28 C.F.R. § 0.160 (1985). In all cases in which the amount of the offer in proposed settlement exceeds the applicable amount specified in § 0.160, and in any case falling within any of the exceptions enumerated in § 0.160(c), the Assistant Attorney General concerned shall, if in his opinion the offer of compromise, or administrative action to settle, should be accepted, transmit his recommendation to that effect to the Deputy Attorney General. (b) The Deputy Attorney General is authorized to exercise the settlement authority of the Attorney General as to all claims on behalf of, and all claims against, the United States. 28 C.F.R. § 0.161 (1985).

It is not clear to us that the foregoing authorizes a U.S. Attorney only to settle and compromise money claims by the United States not exceeding $100,000. But we need not decide whether the government can now assert that the U.S. Attorney's decision not to intervene or object to the settlement was an unauthorized act in light of the regulation, for *this* regulation is clearly not applicable to *this* case. The interest of the government in this matter was not a *money claim* by the United States. The Seventh Circuit's opinion at best created in the government a possible future interest in a fund currently owned by others (i.e., late claimants and potential unspecified remaindermen). To put the matter slightly differently: the issue here is not whether, under 28 C.F.R. § 0.160, the U.S. Attorney had the authority to settle and compromise a money claim of the United States in excess of $100,000; the issue is whether the U.S. Attorney had the authority to take (or not to take) certain measures [1238] which, given the Seventh Circuit's decision, might have been necessary to protect whatever interest the United

States may have had in any future residue in the fund. Clearly, the answer to the latter question is that he did.

The authority of a U.S. Attorney to "prosecute or defend, for the Government, all civil action suits or proceedings in which the United States is concerned" is governed by 28 U.S.C. § 547. Under this statute, the U.S. Attorney is given broad discretion in deciding when to initiate legal proceedings. Courts, moreover, are "powerless to interfere with his discretionary power. The court cannot compel him to prosecute a claim or even an indictment." *Pugach v. Klein*, 193 F.Supp. 630, 635 (S.D.N.Y.1961).

Section 547 confers on the United States Attorney the authority to participate in a case by petitioning to intervene. *Martindell v. International Telephone and Telegraph Corp.*, 594 F.2d 291, 294 (2nd Cir.1979) (when the government's interest is at stake, the proper procedure is for the United States to file a petition to intervene pursuant to Fed.R.C.P. 24); *see also* 28 U.S.C. § 2042 (specifically placing responsibility for protecting funds deposited in the United States Treasury pursuant to that statute on the United States Attorney). In addition to § 547, Title 4 of the *United States Attorneys' Manual*, § 4-1.327 provides:

> U.S. Attorneys are *requested* to report any infringement of, or dereliction with respect to the property or other interest of the United States *warranting the institution of civil proceedings* when such matters have not been referred for handling. (Emphasis added).

The language of § 4-1.327 is discretionary, not mandatory or directive. Here, the parties and the Committee brought the issue of the possible interest of the United States (a non-party to the litigation) directly to the government's attention by contacting both the Acting U.S. Attorney and the Chief of the Civil Division of the U.S. Attorney's Office in Chicago. After the latter reviewed the proposed stipulated order of settlement, he advised that the government did not object and would not intervene or even appear. Whether that decision was reached after consultation with his superiors in the Justice Department, or whether he took this action on

his own, is both unknown and irrelevant. For under section 547, Hynes had the authority to "defend" in "all civil actions in which the United States is concerned," and the guidelines in the *Manual* gave him discretion whether to report any infringement of any interest of the United States warranting the institution of civil proceedings.

In summary, the government was given proper notice of its potential future interest in the fund and of the proposed settlement agreement which eliminated that interest. After review, Assistant United States Attorney Hynes indicated the government's intention to take no action to oppose that settlement agreement. While he may have consulted his superiors in Washington, the relevant statutes and guidelines clearly gave him the authority to make that decision. For these reasons, we cannot accept the government's contention that the settlement is invalid because no one in the U.S. Attorney's office had the authority (1) to intervene in the case to protect the government's potential future interest in the fund, or (2) to permit the case to be settled by not objecting to the stipulated order of settlement. Clearly, the U.S. Attorney's office had the power to object or to intervene. It did neither. Accordingly, we conclude that the government's arguments in support of its motion to vacate the settlement are without merit.

IV.

For the reasons discussed above, the government's motions to intervene and to vacate the settlement are denied. An appropriate order will be entered.